144-1

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~1655~~. 1061

THE UNITED STATES, APPELLANT,

vs.

BALLIN, JOSEPH & CO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED MARCH 14, 1891.

SUPREME COURT OF THE UNITED STATES.

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INDEX.

	Original.	Print.
Suit No. 13:		
Bond	1	1
Petition for return	4	2
Order for return	8	3
Return of the board	9	4
Exhibit A. Letter from collector to board	11	5
B. Protest	12	5
C. Letter from board to collector affirming collector's decision	15	6
Suit No. 18:		
Bond	17	7
Petition for return	20	8
Order for return	24	10
Return of the board	25	10
Exhibit A. Letter from collector to board	27	11
B. Protest	28	12
C. Letter from collector to board	31	13
D. Protest	33	14
E. Letter from board to collector affirming collector's decision	36	15
F. Testimony of Thomas F. Ryan and Ernest Werner before board	38	16
F. F. Journal of House of Representatives	43	19
G. Testimony of Douglass Hollister before the board	45	20
Extract from minutes containing order of consolidation and the hearing	47	21
Order reversing decision of the board	48	22
Appeal	50	22
Application for allowance of appeal and allowance of same	51	23
Citation	53	23
Clerk's certificate	54	24

1 U. S. circuit court for the southern district of New York.

In the matter of the application of Ballin, Joseph & Co., upon certain merchandise entered by the Majestic, July 3, 1890.

Know all men by these presents, that I, Ernest Werner, of the firm of Ballin, Joseph & Co., am held and firmly bound unto the United States of America in the sum of one hundred dollars, to be paid to the said United States of America.

For the payment of which, well and truly to be made, I bind myself, my heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with my seal and dated the day of October, in the year of our Lord one thousand eight hundred and ninety.

Whereas Julius Ballin, Elias Joseph, Ernest Werner, and Edward Stieglitz, trading under the firm name of Ballin, Joseph & Co., have applied to the circuit court of the United States for the southern district of New York for a review of the question of law and fact involved in certain decisions of the board of the United States appraisers, made upon the entry of certain merchandise imported by them per S. S. Majestic, July 3, 1890;

2 Now, therefore, the condition of this obligation is such that if the above named Julius Ballin, Elias Joseph, Ernest Werner, and Edward Stieglitz, trading under the firm name of Ballin, Joseph & Co., shall prosecute said proceeding with effect and pay all damages and costs which shall be awarded against them therein if they shall fail to make said proceeding good, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

ERNEST WERNER. [SEAL.]

Sealed and delivered and taken and acknowledged this day of October, one thousand eight hundred and ninety, before me.

WILLIAM M. WINSHIP.

UNITED STATES OF AMERICA.
Southern District of New York, ss:

Ernest Werner, being duly sworn, deposes and says that he resides in the southern district of New York, in the city of New York; that he is worth the sum of two hundred dollars over and above all his just debts and liabilities.

ERNEST WERNER.

Sworn to this 21st day of October, A. D. 1890, before me.

[SEAL.] WILLIAM M. WINSHIP,
Notary Public, Kings Co., Cert. filed in N. Y. Co.

This bond approved as to form and amount and sufficiency of surety. Dated New York, October 21, 1890.

E. HENRY LACOMBE.

3 (Endorsed:) 13. U. S. circuit court, southern district of New York. In the matter of the application of Ballin, Joseph & Co., 21890.

upon certain merchandise entered by the Majestic, July 3, 1890. Bond. Stanley, Clarke & Smith, attys. for petitioners, 120 Broadway, N. Y. City. U. S. circuit court. Filed Oct. 21, 1890. John A. Shields, clerk.

4 U. S. circuit court for the southern district of New York.

In the matter of the application of Ballin, Joseph & Co., upon certain merchandise entered by the Majestic, July 3, 1890.

To the circuit court of the United States for the southern district of New York:

The petitioners above named allege that they now are and at the times hereinafter named were copartners, doing business in the city of New York under the firm name of Ballin, Joseph & Co.

That on or about the date hereinafter set forth said firm imported and entered at the port of New York certain merchandise, to wit: Certain manufactures of worsteds by the Majestic, entered July 3, 1890.

That thereafter the collector at that port proceeded to ascertain, fix, and liquidate the rate and the amount of the duties to be paid on said merchandise at the rate of thirty-five cents per pound and thirty-five per cent. ad valorem.

That your petitioners, being dissatisfied with said rate and amount, and within ten days after said determination of said collector, but not before said ascertainment and liquidation of duties, gave notice in writing
5 to the collector setting forth therein distinctly and specifically in respect to each entry and payment the reasons for their objections thereto, and paid the full amount of the duties and charges ascertained to be due thereon.

That thereafter the collector transmitted the invoice and all the papers and exhibits to the board of general appraisers, who, on the 24th day of September, 1890, as to the entry by the Majestic July 3, 1890, returned that they had examined and decided as to the said entry.

That your petitioners are dissatisfied with the decision of said board as to the construction of the law and the facts respecting the classification of said merchandise, and the rate of duty imposed thereon, and the following is a concise statement of the errors of law and fact complained of.

The errors of fact were as follows:

That said goods were determined to be woolen cloths instead of manufactures of worsted, as in truth and fact they were.

That the Secretary of the Treasury has not seen the goods in question, and has never, in fact, classified them as woolen cloths or otherwise.

The errors of law were as follows:

That said goods, when valued at above 40 cents per pound and not exceeding 60 cents per pound, are liable to a duty of only 18 cents per pound and 35% ad valorem; and when valued at over 60 cents per
6 pound and not exceeding 80 cents per pound are liable to a duty of only 24 cents per pound and 35% ad valorem, under Schedule K, act of March 3, 1883.

That the act of Congress of May 9th, 1890, entitled "An act to provide for the classification of worsted cloths as woolens," does not apply because—

1. Said act was never passed according to law in this, that no quorum was present in the House of Representatives when said bill was certified to have been passed.

2. Said act was never passed according to law, and never became a law, because when passed a majority of the members of the House of Representatives were not present in the House of Representatives when said act was passed, and said bill was never declared to have been passed or certified to have been passed when a quorum was present in the House of Representatives; and said act was declared by the Speaker to have been passed and was certified to have been passed when it had not been passed, in violation of section five of article one of the Constitution of the United States.

3. Because said act was not legally enacted in this, that a quorum of the House of Representatives did not vote upon said act.

4. That said act confers no power or authority upon the collector to assess and take duties upon our said importations at the rate of 35 cents a pound and 35 per cent. ad valorem.

5. That said act does not repeal any act imposing the pre-existing
7 rate of duty on our importations here in question nor impose any new duty thereon.

6. That said act does not and can not operate to change the duty upon manufactures wholly or in part of worsted and not in part of wool as provided for in the act of March 3, 1883.

7. That whether or not the Secretary of the Treasury has classified said goods as woolen cloths does not alter the fact that they are manufatures of worsted, and dutiable accordingly.

Wherefore your petitioners apply for a review of the questions of law and fact involved in the decision of said board.

BALLIN, JOSEPH & CO.

(Endorsed:) 13. U. S. circuit court southern district of New York. In the matter of the application of Ballin, Joseph & Co. upon certain merchandise entered by the Majestic, July 3, 1890. Statement and summons to return record. Stanley, Clarke & Smith, attys. for petitioners, 120 Broadway, N. Y. city. U. S. circuit court. Filed Oct. 20, 1890. John A. Shields, clerk.

8 At a stated term of the United States circuit court for the southern district of New York, held at the U. S. court and post-office building in the city of New York, on the 21st day of October, 1890.

Present: Hon. E. Henry Lacombe, circuit judge.

In the matter of the application of Ballin, Joseph & Co. upon certain merchandise entered by the Majestic, July 3, 1890.

On reading and filing the petition herein and on the application and motion of Stanley, Clarke & Smith, attorneys:

It is ordered that the board of appraisers of the port of New York return to this court the record and the evidence heretofore taken by them, together with a certified statement of the facts involved in the case and their decisions thereon.

E. HENRY LACOMBE.

9 (Suit No. 13.)

In the circuit court of the United States for the southern district of New York.

In the matter of the appeal of Ballin, Joseph & Co. from the decision of the board of general appraisers. Return of the board of general appraisers. Suit No. 13. January 23rd, 1890.

The board of general appraisers, in pursuance of the order of the court in the above case, make the following return of the record, evidence, and facts, and their decision thereon:

1st. They state that on the 11th of September, 1890, a letter, a copy of which is hereto attached, marked Exhibit A, was received from the collector of customs at New York, transmitting the protest No. 204 A 12322, of Ballin, Joseph & Co. (Exhibit B) against his decision as to the rate of duty chargeable on "eleven cases of worsteds" imported by them per "Majestic, July 3, 1890.

2nd. They state that on the 24th of September, 1890, the protest above referred to (Exhibit B) was duly considered and determined by the board of general appraisers, consisting of George H. Sharpe, Henderson M. Somerville, and Thad. S. Sharretts. A copy of their decision is hereto attached, marked Exhibit C. That the return made heretofore, in

10 suit No. 18, was intended also to relate to and include suit No. 13 of the same parties; that the testimony there taken and returned was taken in each and both of said suits; and the findings thereon were the same in each case, and the decision made applied to each, including No. 13 as well as No. 18; that all the facts involved in the said cases, so far as ascertained by the board of general appraisers, are fully stated in the opinions and decisions above mentioned.

GEO. H. SHARPE,
HENDERSON M. SOMERVILLE,
CHARLES H. HAM,
Board of General Appraisers.

11 A true copy.
Attest:

J. R. LAKE,
Chief Clerk.
J. J.

("EX: A.")

CUSTOM-HOUSE, NEW YORK CITY.
Collector's Office, Sept. 10, 1890.

To the Hon. Board of U. S. Gen'l Appraisers, New York:

GENTLEMEN: In pursuance of the requirements of sec. 14, act of June 10, 1890, I transmit herewith the protests, viz:

204 A—12322 of Ballin, Joseph & Co.
205 A—12209 F. Butterfield & Co.
206 A—12372 Herrman Sternbach & Co.
207 A—12440 Sulzbacher, G. & W.,

from the assessment of duty by this office at the rate of 35 cents per lb. and 35 per cent. ad valorem on certain so-called "worsteds" imported by them in the vessels named.

I have to state that the merchandise was returned by the appraiser upon the invoices as "woolen cloths, under 80c.," and duty was assessed thereon at the rate of 25c. per lb. and 35 per cent. ad valorem, under the provisions of T. I., new, 362, & S. 10020.

The entries and invoices covered by the above protests are enclosed herewith.

The naval officer concurs in the decision of this office.

Respectfully, yours,

(Signed) J. J. COUCH,
Special Deputy Collector.

(13 Encl.)

(Endorsed:) "Ex. A." Office U. S. General Appraisers, New York. Received Sept. 11, 1890.

12 ("Ex. B.")

[Ballin, Joseph & Co., 96 and 98 Franklin street.]

Entry No. 107683.] NEW YORK, *August* 25, 1890.

HON. JOEL B. ERHARDT,
Collector of the Port of New York:

We hereby protest against the liquidation and assessment of duty at the rate of 35 cents per pound and 35 per cent. ad valorem, as made by you on our entry of B ◇J◇ & Co. 2202 2212, eleven cases of worsteds, by the steamer Majestic, from Liverpool, and entered for warehouse July 3d, 1890.

We claim that said goods are manufactures composed wholly or in part of worsted, not composed in part of wool, and as such, when valued at above 40 cents per pound and not exceeding 60 cents per pound, are liable to a duty of only 18 cents per pound and 35 per cent. ad valorem; and when valued at over 60 cents per pound and not exceeding 80 cents per pound, are liable to a duty of only 24 cents per pound and 35 per cent. ad valorem, under Schedule K, act of March 3rd, 1883, and we protest against any higher or different rate of duty.

We further protest that the act approved May 9th, 1890, entitled "An act to provide for the classification of worsted cloths as woolens," does not apply herein for the following reasons, and for each and every of them, and we separately protest upon each ground by itself:

1. Said act was never passed according to law, in this, that no
13 quorum was present in the House of Representatives when said bill was certified to have been passed.

2. Said act was never passed according to law and never became a law, because when passed a majority of the members of the House of Representatives were not present in the House of Representatives when said act was passed, and said bill was never declared to have been passed or certified to have been passed when a quorum was present in the House of Representatives, and said act was declared by the Speaker to have been

passed, and was certified to have been passed when it had not been passed, in violation of section five of article one of the Constitution of the United States.

3. Because said act was not legally enacted in this, that a quorum of the House of Representatives did not vote upon said act.

4. That said act confers no power or authority upon you to assess and take duties upon our said importations at the rate of 35 cents per pound and 35 per cent. ad valorem.

5. That as a matter of fact the Secretary of the Treasury has not seen the goods covered by said entry, and has never in fact classified them for duty.

6. That said act does not repeal any act imposing the pre-existing rate of duty on our importations here in question, nor impose any new duty thereon.

7. That said act does not and can not operate to change the duty upon manufactures, wholly or in part of worsted and not in part of wool as provided for in the act of March 3, 1883.

14 8. That whether or not the Secretary of the Treasury has classified said goods as woolen cloths does not alter the fact that they are manufactures of worsted and dutiable accordingly.

We pay the amount exacted under duress and compulsion to obtain and retain possession of our goods, holding you and the Government responsible for its return.

We remain, yours truly,

BALLIN, JOSEPH & CO.

(Endorsed:) 12322. 204 A. Ballin, Joseph & Co. Majestic. Worsteds.—"Ex. B." Custom-house, New York. Aug. 25, 1890. Received. W. Majestic, July 3, '90. Liq. Aug. 15, '90. Pro. Aug. 25, '90. " 4.

15 [U.S.R.L. 104—110A, 204—207A.]

"Ex. C."

PORT OF NEW YORK,
OFFICE OF U. S. GENERAL APPRAISER,
Sept. 24, 1890.

COLLECTOR OF CUSTOMS,
New York:

SIR: Your assessment of duty at the rates prescribed by T. I. 362 for woolen cloths, on certain so-called worsted cloths, imported in the vessels named, being in accordance with provisions of the act of May 9th, 1890, cited in Treasury Department's decision S. 10020, is hereby affirmed on the following protests received with your letters of the 5th and 10th instant:

104A—12268 of J. B. Atherton, Arizona, July 15, '90.
105A—12250 of Herrman, Sternbach & Co., "Etruria," July 14, '90.
106A—12085 of " " " " " "Umbria," " 1, '90.

107A—12236 of F. Butterfield & Co., "C. New York," July 10, '90.
108A—12305 of Sulzbacher, Gitterman & Wedeles, "C. Richmond," " 21, '90.
109A—12336 of " " " "C. New York," " 10, '90.
110A—12313 of Victor & Achelis, "Wyoming," May 15, '90.
204A—12322 of Ballin, Joseph & Co., "Majestic," July 3, '90.
205A—12209 of F. Butterfield & Co., "Hindoo," June 2, '90.
206A—12372 of Herrman, Sternbach & Co., "Cufic," July 8, '90.
207A—12440 of Sulzbacher, Gitterman & Wedeles, "Germanic," " 12, '90.

The invoices and entries received with your letters are herewith returned.

Respectfully, yours,

GEO. H. SHARPE,
HENDERSON M. SOMERVILLE,
THAD. S. SHARRETTS,
Board.

A true copy.
Attest:

J. R. LAKE,
Chief Clerk.

11 enclosures.

16 (Endorsed:) Copy of decision of board of general appraisers of Sept. 24, 1890. Rejecting protest No. 204A—12322 of Ballin, Joseph & Co., "Exhibit C."

(Further endorsed:) No. 13. U. S. circuit court, southern district of N. Y. In the matter of appeal of Ballin, Joseph and Co. from the decision of the board of general appraisers. Return of record, evidence, and facts by board of general appraisers. U. S. circuit court. Filed Jan. 24, 1891. John A. Shields, clerk.

17 U. S. circuit court for the southern district of New York.

In the matter of the application of Ballin, Joseph & Co. upon certain merchandise entered by the City of Richmond, July 21, 1890; by the City of New York, July 10, 1890.

Know all men by these presents that I, Ernest Werner, of the firm of Ballin, Joseph & Co., am held and firmly bound unto the United States of America in the sum of one hundred dollars, to be paid to the said United States of America.

For the payment of which, well and truly to be made, I bind myself, my heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with my seal, and dated the 27th day of October, in the year of our Lord one thousand eight hundred and ninety.

Whereas Julius Ballin, Elias Joseph, Ernest Werner, and Edward Stieglitz, trading under the firm name of Ballin, Joseph & Co., have ap-

plied to the circuit court of the United States for the southern district of New York for a review of the question of law and fact involved in certain decisions of the board of United States appraisers made upon the entry of certain merchandise imported by them per S. S. City of Richmond,
18 July 21, 1890, and by the City of New York July 10, 1890:

Now, therefore, the condition of this obligation is such that if the above named Julius Ballin, Elias Joseph, Ernest Werner, and Edward Stieglitz, trading under the firm name of Ballin, Joseph & Co., shall prosecute said proceeding with effect and pay all damages and costs which shall be awarded against them therein if they shall fail to make said proceeding good, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

ERNEST WERNER.

Sealed and delivered and taken and acknowledged this day of October, one thousand eight hundred and ninety, before me.

[SEAL.] ROBT. E. TIBBITS,
Notary Public, Queens Co., N. Y.

Certificate filed in New York County.

UNITED STATES OF AMERICA,
Southern district of New York, ss:

Ernest Werner, being duly sworn, deposes and says that he resides in the southern district of New York, in the city of New York; that he is worth the sum of two hundred dollars over and above all his just debts and liabilities.

ERNEST WERNER.

Sworn to this 27th day of October, A. D. 1890, before me.

[SEAL.] ROBT. E. TIBBITS,
Notary Public, Queens Co., N. Y.

Certificate filed in New York County.

This bond approved as to form and amount and sufficiency of surety.

Dated New York, October 28, 1890.

E. HENRY LACOMBE.

19 (Endorsed:) (18.) U. S. circuit court, southern district of New York. In the matter of the application of Ballin, Joseph & Co. upon certain merchandise entered by the City of Richmond, July 21, 1890; by the City of New York, July 10, 1890. Bond. Stanley, Clarke & Smith, attys. for petitioners, 120 Broadway N. Y. City. U. S. circuit court. Filed Oct. 28, 1890. John A. Shields, clerk.

20 U. S. circuit court for the southern district of New York.

In the matter of the application of Ballin, Joseph & Co. upon certain merchandise entered by the City of Richmond, July 21, 1890; by the City of New York, July 10, 1890.

To the circuit court of the United States for the southern district of New York:

The petitioners above named allege that they now are and at the times hereinafter named were copartners doing business in the city of New York under the firm name of Ballin, Joseph & Co.

That on or about the dates hereinafter set forth said firm imported and entered at the port of New York certain merchandise, to wit: Certain manufactures of worsted by the City of Richmond, entered July 21, 1890, and by the City of New York, July 10, 1890.

That thereafter the collector at the port proceeded to ascertain, fix, and liquidate the rate and the amount of the duties to be paid on said merchandise at the rate of thirty-five cents per pound and thirty-five per cent. ad valorem.

That your petitioners, being dissatisfied with said rate and amount, and within ten days after said determination of said collector but not
21 before said ascertainment and liquidation of duties, gave notice in writing to the collector setting forth therein distinctly and specifically in respect to each entry and payment the reasons for their objections thereto and paid the full amount of the duties and charges ascertained to be due thereon.

That thereafter the collector transmitted the invoice and all the papers and exhibits to the board of general appraisers, who, on the 13th day of October, 1890, as to the entries by the City of Richmond, July 21, 1890, and by the City of New York, July 10, 1890, returned that they had examined and decided as to the said entries.

That your petitioners are dissatisfied with said decision of said board as to the construction of the law and the facts respecting the classification of said merchandise and the rate of duty imposed thereon, and the following is a concise statement of the errors of law and facts complained of:

The errors of fact were as follows:

That said goods were determined to be woolen cloths instead of manufactures of worsted, as in truth and fact they were.

That the Secretary of the Treasury has not seen the goods in question and has never in fact classified them as woolen cloths or otherwise.

The errors of law were as follows:

That said goods, when valued at above 40 cents per pound and not exceeding 60 cents per pound, are liable to a duty of only 18 cents per
22 pound and 35 per cent. ad valorem; and when valued at over 60 cents per pound and not exceeding 80 cents per pound are liable to a duty of only 24 cents per pound and 35 per cent. ad valorem, under Schedule K, act of March 3, 1883.

That the act of Congress of May 9th, 1890, entitled "An act to provide for the classification of worsted cloths as woolens," does not apply, because—

1. Said act was never passed according to law in this, that no quorum was present in the House of Representatives when said bill was certified to have been passed.

2. Said act was never passed according to law, and never became a law, because when passed a majority of the members of the House of Representatives were not present in the House of Representatives when said act was passed, and said bill was never declared to have been passed or certified to have been passed when a quorum was present in the House of Representatives, and said act was declared by the Speaker to have been passed and was certified to have been passed when it had not been passed, in violation of section five of article one of the Constitution of the United States.

3. Because said act was not legally enacted in this, that a quorum of the House of Representatives did not vote upon said act.

4. That said act confers no power or authority upon the collector to assess and take duties upon our said importations at the rate of 35 cents a pound and 35 per cent. ad valorem.

23 5. That said act does not repeal any act imposing the pre-existing rate of duty on our importations here in question nor impose any new duty thereon.

6. That said act does not and cannot operate to change the duty upon manufactures wholly or in part of worsted and not in part of wool, as provided for in the act of March 3, 1883.

7. That whether or not the Secretary of the Treasury has classified said goods as woolen cloths does not alter the fact that they are manufactures of worsted and dutiable accordingly.

Wherefore your petitioners apply for a review of the questions of law and fact involved in the decision of said board.

BALLIN, JOSEPH & CO.

(Endorsed:) U. S. circuit court, southern district of New York. In the matter of the application of Ballin, Joseph & Co. upon certain merchandise entered by the city of Richmond, July 21, 1890; by the city of New York, July 10, 1890. Statement and summons to return record. Stanley, Clarke & Smith, att'ys for petitioners, 120 Broadway, N. Y. City. U. S. circuit court. Filed Oct. 28, 1890. John A. Shields, clerk.

24 At a stated term of the United States circuit court for the southern district of New York, held at the U. S. court and post-office building in the city of New York on the 28th day of October, 1890.

Present: Hon. E. Henry Lacombe, circuit judge.

In the matter of the application of Ballin, Joseph & Co. upon certain merchandise entered by the City of Richmond, July 21, 1890; by the City of New York, July 10, 1890.

On reading and filing the petition herein and on the application and motion of Stanley, Clarke & Smith, attorneys:

It is ordered that the board of appraisers of the port of New York return to this court the record and the evidence heretofore taken by them, together with a certified statement of the facts involved in the case and their decision thereon.

E. HENRY LACOMBE.

25 (Suit No. 18.)

UNITED STATES OF AMERICA,
Southern District of New York, ss:

In the circuit court of the U. S. for the southern district of New York.

In the matter of the appeal of Ballin, Joseph & Co. from the decision of the board of general appraisers. "No. 18." Return of the board of general appraisers.

The board of general appraisers, in pursuance of the order of the court in the above case, make the following return of the record, evidence, and facts, and their decision thereon:

First. They state that on the 19th of September, 1890, a letter, a copy of which is hereto attached, marked Exhibit "A," was received from the

collector of customs at New York, transmitting the protest No. 332 A / 12472 of Ballin, Joseph & Co. (Exhibit B), against his decision as to the rate of duty chargeable on "three cases of worsteds" imported by them per "City of Richmond," July 21, 1890.

Second. They state that on the 27th of September, 1890, another letter, a copy of which is also hereto attached, marked Exhibit "C," was received from the collector of customs at New York, transmitting the protest No. 426 A / 12751 of Ballin, Joseph & Co. (Exhibit "D")
26 against his decision as to the rate of duty chargeable on "sixteen cases of worsteds" imported by them per "City of New York," July 10, 1890.

Third. They state that on the 13th of October, 1890, the above protests (Exhibits "B" and "D") were duly considered and determined by the board of general appraisers, consisting of George H. Sharpe, Henderson M. Somerville, and Charles H. Ham. A copy of their decision is hereto attached, marked Exhibit "E." They further certify that they took the following testimony in the said cases, which is hereto attached, marked Exhibits "F" and "FF" and "G." Samples marked "S.S." herewith returned.

We find from said evidence as follows:

(1) That the goods in question are worsted, and not woolen goods.

(2) That the Secretary of the Treasury never examined or classified the goods in question.

(3) That the Journal of the United States House of Representatives shows the facts attending the passage of the act of May 9, 1890, as they are stated in Exhibit "FF." These facts are not deemed different, in substance, from those stated in their decision made October 12, 1890, numbered among the published decisions of the board as 10336, G. A. 57, upon the authority of which these cases were decided, and to which we hereby direct attention by way of reference.

GEO. H. SHARPE,
HENDERSON M. SOMERVILLE,
CHARLES H. HAM,
Board of U. S. Gen'l Appraisers.

27 [H. E. E. J. J. "Ex. A."]

Exhibit A.

CUSTOM-HOUSE, NEW YORK CITY,
Collector's Office, Sept. 18, 1890.

To the Hon. Board of U. S. Gen'l Appraisers, New York:

GENTLEMEN: In pursuance of the requirements of section 14, act of June 10, 1890, I transmit herewith the protests = 332 A, 12472, of Ballin, Joseph & Co., and 333 A, 12570, of Rothfeld, Stern & Co., from the assessment of duty by this office, at the rate of 35c. per pound and 35% ad valorem on certain so-called "worsted," imported by them in the vessels named.

I have to state that the merchandise was returned by the appraiser upon the invoice as "woolen cloths, under 80c., and duty was assessed thereon at the rate of 35c. per lb. and 35% ad valorem under the provisions of T. L., new, 362 & S. 10020.

The entries and invoices covered by the above protests are enclosed herewith.

The naval officer concurs in the decision of this office.

Respectfully, yours,

J. J. COUCH
Special Deputy Collector.

(7 encl.)
A true copy.
Attest:

J. R. LAKE,
Chief Clerk, Board U. S. Gen'l Appr's.

(Endorsed:) Custom-house, collector's office, New York City, Sept. 18, 1890. J. B. Erhardt, collector. Subject, protest. = 12472, &c. Ballin, Joseph & Co. Copy. Ex. A. No. of inclosures, 7.

28 [Liq. Aug. 29,1890. Ballin, Joseph & Co., 96 and 98 Franklin st. Entry No. 117791. "EX. B."]

(Exhibit B.)

NEW YORK, *Sept. 2d*, 1890.

Hon. JOEL B. ERHARDT,
Collector of the Port of New York:

We hereby protest against the liquidation and assessment of duty at the rate of 35 cents per pound and 35% ad valorem as made by you on our entry of B. J. & Co., 2231 / 2233, three cases of worsteds by the steamer City of Richmond, from Liverpool, and entered for consumption, July 21st, 1890.

We claim that said goods are manufactures composed wholly or in part of worsted, not composed in part of wool, and as such, when valued at above 40 cents per pound and not exceeding 60 cents per pound, are liable to a duty of only 18 cents per pound and 35% ad valorem; and when valued at over 60 cents per pound and not exceeding 80 cents per pound, are liable to a duty of only 24 cents per pound and 35% ad valorem, under Schedule K, act of March 3rd, 1883, and we protest against any higher or different rate of duty.

We further protest that the act approved May 9th, 1890, entitled "An act to provide for the classification of worsted cloths as woolens" does not apply herein for the following reasons, and for each and every one of them, and we separately protest upon each ground by itself.

29 1. Said act was never passed according to law, in this, that no quorum was present in the House of Representatives when said bill was certified to have been passed.

2. Said act was never passed according to law and never became a law, because when passed a majority of the members of the House of Representatives were not present in the House of Representatives when said act was passed, and said bill was never declared to have been passed or certi-

fied to have been passed when a quorum was present in the House of Representatives, and said act was declared by the Speaker to have been passed, and was certified to have been passed when it had not been passed, in violation of section five of article one of the Constitution of the United States.

3. Because said act was not legally enacted in this, that a quorum of the House of Representatives did not vote upon said act.

4. That said act confers no power or authority upon you to assess and take duties upon our said importations at the rate of 35 cents per pound and 35 per cent. ad valorem.

5. That as a matter of fact the Secretary of the Treasury has not seen the goods covered by said entry, and has never in fact classified them for duty.

6. That said act does not repeal any act imposing the pre-existing rate of duty on our importations here in question nor impose any new duty thereon.

7. That said act does not and can not operate to change the duty upon manufactures wholly or in part of worsted and not in part of wool as provided for in the act of March 3, 1883.

8. That whether or not the Secretary of the Treasury has classified said goods as woolen cloths does not alter the fact that they are manufactures of worsted and dutiable accordingly.

We pay the amount exacted under duress and compulsion to obtain and retain possession of our goods, holding you and the Government responsible for its return.

We remain, yours truly,

BALLIN, JOSEPH & CO.

(Endorsed:) 332 A. 12472. Ballin, Joseph & Co. C. of Richmond. Worsteds. Custom-house, New York, Sep. 2, 1890. Received.—C. C. Richmond, July 22. Liq. Aug. 29; prot. Sep. 2. "Ex. B."

[H. E. E. B. H. V. "EX. C."]

(Exhibit C.)

CUSTOM HOUSE, NEW YORK CITY,
Collector's Office, Sept. 25, 189 .

To the Hon. Board of U. S. Gen'l Appraisers, New York:

GENTLEMEN: In pursuance of the requirements of sec. 14, act of June 10, 1890, I transmit herewith protests of Ballin, Joseph & Co., #426 A—12751; H. M. Raborg, 427 A—12705, 428 A—12870; Victor and Achelis, 429 A—12760, from the assessment of duty by this office at the rate of 35c. per lb., and 35 per cent. ad valorem, on certain so-called "worsteds," imported by them in the vessels named.

I have to state that the merchandise was returned by the appraisers upon the invoices as "woolen cloths under 80c.," and duty was assessed thereon at the rate of 35c. per lb., and 35 % ad valorem, under the provisions of T. I. new 362 & S. S. 10020.

The entries and invoices covered by the above protests are enclosed herewith.

The naval officer concurs in the decision of this office.

Respectfully yours,

J. J. COUCH,
Special Deputy Collector.

(14 Encl.)

Attest:

J. R. LAKE,
Chief Clerk Board U. S. Gen'l Appr's.

32 (Endorsed:) Custom house, collector's office, New York, Sept. 25, 1890. J. B. Erhardt, collector. Subject: Protest #12751, etc. Ballin, Joseph & Co. et al. Copy. "Ex. C."

33 [Liq. Sept. 9th, 1890. Ballin, Joseph & Co., 96 & 98 Franklin St. Bond No. 840. Entry No. 111576. "Ex. D."]

(Exhibit D.)

NEW YORK, *Sept.* 11th, 1890.

Hon. JOEL B. ERHARDT,
Collector of the Port of New York:

We hereby protest against the liquidation and assessment of duty at the rate of 35 cents per pound and 35% ad valorem as made by you on our entry of

B
⟨J⟩ 2215 2223, 2228, 2230
& Co.

B
J⟩ 933 935
& Co.

J C
⟨B⟩ 526 527,

Sixteen cases of worsteds,

by the steamer City of New York, from Liverpool, and entered for warehouse July 10th, 1890.

We claim that said goods are manufactures composed wholly or in part of worsted, not composed in part of wool, and as such when valued at above 40 cents per pound and not exceeding 60 cents per pound, are liable to a duty of only 18 cents per pound and 35% ad valorem; and when valued at over 60 cents per pound and not exceeding 80 cents per pound, are liable to a duty of only 24 cents per pound and 35% ad valorem, under Schedule K, act of March 3rd, 1883, and we protest against any higher or different rate of duty.

We further protest that the act approved May 9th, 1890, entitled "An act to provide for the classification of worsted cloths as woolens" does not apply herein for the following reasons, and for each and every one of them, and we separately protest upon each ground by itself.

34 1. Said act was never passed according to law, in this, that no quorum was present in the House of Representatives when said bill was certified to have been passed.

2. Said act was never passed according to law, and never became a law, because when passed a majority of the members of the House of Representatives were not present in the House of Representatives when said act was passed, and said bill was never declared to have been passed or certified to have been passed when a quorum was present in the House of Representatives and said act was declared by the Speaker to have been passed, and was certified to have been passed when it had not been passed, in violation of section five of article one of the Constitution of the United States.

3. Because said act was not legally enacted, in this, that a quorum of the House of Representatives did not vote upon said act.

4. That said act confers no power or authority upon you to assess and take duties upon our said importations at the rate of 35 cents per pound and 35 per cent, ad valorem.

5. That as a matter of fact the Secretary of the Treasury has not seen the goods covered by said entry, and has never in fact classified them for duty.

6. That said act does not repeal any act imposing the pre-existing rate of duty on our importations here in question, nor impose any new duty thereon.

35 7. That said act does not and cannot operate to change the duty upon manufactures wholly or in part of worsted and not in part of wool, as provided for in the act of March 3, 1883.

8. That whether or not the Secretary of the Treasury has classified said goods as woolen cloths does not alter the fact that they are manufactures of worsted and dutiable accordingly.

We pay the amount exacted under duress and compulsion, to obtain and retain possession of our goods, holding you and the Government responsible for its return.

We remain yours, truly,

BALLIN, JOSEPH & CO.

(Endorsed:) 426 A. 12751. Ballin, Joseph & Co. C. New York. Worsteds. "Ex. D." Custom house, New York, Sep. 11, 1890. Received. Vessel C., New York. Entry July 10. Liq-ed Sep. 9. Prot. Sep. 11.

36 [332/183 A. 426/420 A. "Ex. E."]

(Exhibit E.)

PORT OF NEW YORK,
OFFICE OF THE U. S. GENERAL APPRAISER,
October 13th, 1890.

COLLECTOR OF CUSTOMS,
New York:

SIR: Your assessment of duty at the rate provided in paragraph 362, tariff act of March 3rd, 1883, for woolen cloths, on certain so-called worsteds, imported in the vessels named, being in accordance with the act of May 9th, 1890 (cited in Treasury Department's decision 10020), and with our ruling of even date herewith (254, 262 A), is hereby affirmed on the

protests received with your letters of the 18th and 25th ultimo, described in the accompanying schedule.

The invoices and entries received with your letters are returned herewith.

Respectfully, yours,

GEORGE H. SHARPE,
HENDERSON M. SOMERVILLE,
CHARLES H. HAM,
Board.

(15 enclosures & schedule, 6 sets).
A true copy.
Attest:

J. R. LAKE,
Chief Clerk, Board U. S. Gen'l Appr's.

(Endorsed:) Copy of decision of Board of Gen'l Appraisers of Oct. 13, '90. Rejecting protests No. 426 A, 12751, 332A 12472, of Ballin, Joseph & Co., agst. decision of collector, &c. "Ex. E."

37 (332/333 A. 426/429 A. "Ex. E.")

No.	Name of importer.	Vessel.	Date of entry.
332 A 12472	Ballin, Joseph & Co	C. New York	July 22, '90.
333 A 12550	Ballin, Joseph & Co	Britannic	July 28, '90.
426 A 12751	Ballin, Joseph & Co	C. New York	July 10, '90.
427 A 12765	H. M. Ralloz	Italy	Aug. 1, '90.
428 A 12870			July 30, '90.
429 A 12780	Victor & Achelis	C. Richmond	July 21, '90

(Endorsed: 426–429 A.)

38 (Exhibit F.)

JANUARY 14TH, 1891.

Application of the court with respect to the merchandise of Ballen, Joseph & Co., imported per Majestic, July 3rd, 1890, suit No. 13; same parties, per city of Richmond, July 21, 1890; same, per city of New York, July 10th, 1890, suit No. 18.

Mr. THOMAS F. RYAN, examiner 6th division, called, testified as follows:

Examined by Mr. CLARK:

Q. You are an examiner in the appraiser's stores?
A. Yes, sir.
Q. Examiner in what class of goods?
A. Woolen goods.
Q. What division?
A. Sixth division.
Q. Have you examined to see if the invoices of Ballen, Joseph & Co., by the Majestic, July 3rd, city of Richmond, July 21st, and city of New York, July 10th, went through that division?

A. I have a memorandum showing that invoices representing those shipments were received and passed through our division, and I presume that all the details really refer to the ones you have in view.

Q. Have you the case numbers of the ones examined?

A. The first, July 3rd, is 2202, 2212; July 21st, 2231 to 2233; July 10th, 2215 to 2223, 2228, and 2230, and case 933 to 935.

39 Q. Those goods came to the appraiser's stores and went out in the regular way. Can you tell about how long they were there?

A. The invoice of July 3rd is marked having been received on the 5th of July and returned on the 16th. The invoice of July 21st is marked as having been received on the 22nd of July and returned on the 31st, and the invoice of July 10th is marked as having been received on the 12th of July and returned on the 19th.

Q. During those periods were the goods, to your knowledge, examined by the Secretary of the Treasury in person?

A. That I could not say.

Q. Were they to your knowledge examined by him?

A. No; I have no knowledge that they were examined by him.

Mr. SOMERVILLE. Do you think you would have known it if he had appeared there and examined them?

A. I did not hear of any examination, but I could not testify of my own knowledge that he did not.

Mr. CLARKE. You have no knowledge that he did?

A. I am not prepared to say that he did.

Mr. SOMERVILLE. Have you any reason to believe that he did?

A. Well, in our business there is a great deal goes on of which we are not informed in connection with our business and of which I am not prepared to say that such actions did not take place, while I am not

40 prepared to say that they did.

Mr. SOMERVILLE. Did you ever hear of the Secretary of the Treasury appearing around there making an examination of goods—examining any goods there in your Department, with a view of classifying them?

A. I have not noticed him at all.

Q. If he had appeared there for the purpose of examining these goods and classifying them, don't you think you would probably have known or heard of it?

A. It is very likely.

Mr. CLARKE. The goods were classified and returned in the regular way, so far as you know?

A. So far as I know.

Q. How many examiners are there on that floor in this class of goods?

A. There are two of us.

Q. Who is the other one?

A. And a third one returned some invoices in the press of the busy season; they were Mr. Jellison, Mr. Kenney, and myself.

Mr. SOMERVILLE. What are your business hours?

A. From 9 to 4.

Q. Are you there most of the time from 9 to 4?

A. Yes, sir.

Q. What time, on an average, are you absent?

A. About lunch hour.

41 Q. How long?

A. On an average of about half an hour.

Mr. CLARKE. With that exception you are there through the day?

A. Yes. Of course sometimes we come here and are required to go to different divisions and classify goods there.

Mr. ERNEST WERNER, sworn, testified as follows:

Examined by Mr. CLARKE:

Q. You are a member of the firm of Ballen, Joseph & Co.?

A. Yes, sir.

Q. And were in July, 1890?

A. Yes, sir.

Q. You received the goods that are the subject of these three importations spoken of?

A. Yes, sir; those are our importations.

Q. Have you samples of the goods?

A. The samples are here (offered in evidence), marked S. S., in envelope.

Q. Do you know Mr. Douglas Hollister?

A. Yes, sir.

Q. Did you show him some samples when he testified here yesterday or day before?

A. The samples subject of his examination are the identical samples contained in these envelopes here.

Q. Were those samples cut from each case of the goods?

A. Yes, sir.

42 Q. How do the remainder of the goods in the cases compare with the samples you have produced?

A. These samples represent every quality in each case.

Q. Are the others made of similar material?

A. They are the identical goods; some are different, perhaps, in pattern.

Q. How long have you been in the business of dealing in woolen and worsted goods?

A. Since 1865, as a boy 16 years old.

Q. Have you ever visited mills in which such goods are made?

A. I have.

Q. Studied the process of manufacture?

A. I have.

Q. From your knowledge of the business derived in that manner, can you state of what material the goods contained in these three invoices are composed?

A. They are composed of worsted yarn, solely.

Q. Entirely of worsted?

A. Yes, sir.

Q. What is the distinction between wool and worsted?

A. Worsted is manufactured of wool, which is prepared by combing the wool and drawing and spinning it to a very great length, making a very fine thread, twisting it hard; while woolen goods are simply carded and drawn to a very much less extent and making an entirely different fabric.

Q. In the process of the combing is any portion of the fleece eliminated?

43 A. The short files are extracted which remain in the woolen yarns and make woolen goods.

Q. Under what names were those goods bought and sold in March, 1883, prior to that and since that time?

A. They were bought and sold as worsteds.

Whereupon Mr. Clarke introduced in evidence the Journal of the House of Representatives, and read from it as follows (marked F. F.):

(Exhibit F. F.)

The Speaker laid before the House the bill of the House (H. R. 9548) providing for the classification of worsted cloths as woolens, coming over from last night as unfinished business, with the previous question and the yeas and nays ordered.

The House having proceeded to the consideration and the question being put,

Shall the bill pass?

There appeared:

Yeas	138
Nays	0
Not voting	189

The said roll-call having been recapitulated, the Speaker announced from a list noted and furnished by the Clerk, at the suggestion of the Speaker, the following named members as present in the Hall when their names were called and not voting, viz:

Messrs. Allen of Mississippi, Anderson of Mississippi, Bankhead, Barwig, Biggs, Blanchard, Blount, Breckenridge of Kentucky, Brookshire, Buchanan of Virginia, Bullock, Bynum, Campbell, Caruth,

44 Catchings, Chipman, Clarke of Alabama, Clunie, Cobb, Cothran, Crain, Crisp, Culberson of Texas, Cummings, Davidson, Dockery, Dunphy, Edmunds, Fitch, Fithian, Forney, Fowler, Geissenheiner, Goodnight, Hatch, Hayes, Haynes, Heard, Hemphill, Henderson of North Carolina, Holman, Hooker, Kilgore, Lenhan, Lee, Lester of Georgia, Martin of Indiana, Martin of Texas, McClellan, McCreary, McMillin, McRae, Montgomery, Moore of Texas, Norton, O'Neil of Massachusetts, Outhwaite, Owens of Ohio, Perkins, Pierce, Prince, Richardson, Rogers, Sayers, Skinner, Spinola, Stewart of Georgia, Stockdale, Tarsney, Turner of Georgia, Walker of Missouri, Wike, Williams of Illinois, and Wilson of West Virginia.

The Speaker thereupon stated that the said members present and refusing to vote (74 in number) together with those recorded as voting (138 in number) showed a total of 212 members present, constituting a quorum present to do business, and that the yeas being 138 and the nays none, the said bill was passed.

45 (Exhibit G.)

U. S. circuit court.

In the matter of the appeals of Ballin, Joseph & Co. upon importations and entries by them by S. S. Majestic, July 3d, 1890, and per the City of New York, July 10th, 1890, and per City of Richmond, July 21st, 1890, against Joel B. Erhardt, collector.

DOUGLAS HOLLISTER, being duly sworn, as a witness called in behalf of said Ballin, Joseph & Co., says in reply to interrogations:

Q. Where do you reside?

A. 50 West 82nd st.

Q. What was your business in July, 1890?

A. Dry goods commission.

Q. How long had you been in that business?

A. 27 years.

Q. Dealing in what classes of goods?

A. Woolens and worsteds.

Q. Are you familiar with the distinction between woolens and worsteds?

A. I am.

Q. How did you acquire that familiarity?

A. By handling the goods and going to the mills.

Q. Did your employment require you to visit the mills frequently?

A. Yes, sir.

Q. Can you describe in a general way how worsted is produced?

46 A. By combing and drawing and spinning.

Q. Can you in the manufactured fabric tell whether it was composed of a woolen or worsted yarn?

A. Yes, sir.

Q. Please state the mills with which you have been connected during the last 27 years.

A. Auburn Woolen Co., Canoga Woolen Co., Wauskuck Worsted Co., Edward Harris, Lippitt Woolen Co., and others.

Q. I show you samples of goods from cases 2202 to 2212 by the Majestic, and ask you to examine them and state from what they are made.

A. They are made from worsted yarn.

Q. Entirely worsted yarn?

A. Yes, sir.

Q. I show you samples from cases 2231 to 2233 by the City of Richmond, and ask you to state of what they are composed.

A. Entirely of worsted yarn, sir.

Q. I show you samples of goods by the City of New York from cases 2215 to 2223, case 2230, cases 933 to 935, and cases 526 and 527, and ask you to examine the same and tell of what they are composed.

A. Of worsted yarns.

Q. Then all the goods of which samples have been shown you are, in your opinion, manufactured from worsted?

A. Yes.

Q. Under what name are they bought and sold in the markets, in March, 1883, and prior thereto and since that time?

A. As worsteds.

Sworn to before the board.

DOUGLAS HOLLISTER.

(Endorsed:) No. 18. Circuit court U. S., south dist. of N. Y. In re Ballin, Joseph & Co. Return of the board of appraisers. U. S. circuit court. Filed Jan. 21, 1891. John A. Shields, clerk.

47 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court rooms in the city of New York, on Tuesday the 27th day of January, in the year of our Lord one thousand eight hundred and ninety-one.

Present: The honorable E. Henry Lacombe, circuit judge.

In the matter of the application of Ballin, Joseph & Co., upon certain merchandise entered by the Majestic July 3, 1890. No. 13.

In the matter of the application of Ballin, Joseph & Co., upon certain merchandise entered by the City of Richmond July 21, 1890, and by the City of New York, July 10, 1890. No. 18.

On motion of Stephen G. Clarke, esq.,

Ordered, That the above-entitled actions be consolidated.

Stephen G. Clarke, esq., is heard on behalf of the petitioners.

Henry C. Platt, esq., assistant United States attorney, is heard on behalf of the collector.

Edwin B. Smith, esq., is heard on behalf of the petitioners.

Decision of the board of appraisers reversed.

An extract from the minutes.

JOHN A. SHIELDS,
Clerk.

48 At a stated term of the circuit court of the United States of America for the southern district of New York, held at the United States circuit court rooms in the post-office building in the city of New York, on the 2nd day of March, in the year of our Lord one thousand eight hundred and ninety-one.

Present: The honorable E. Henry Lacombe, circuit judge.

In the matter of the application of Ballin, Joseph & Co., upon certain merchandise entered by the Majestic July 3, 1890, by the city of Richmond July 21, 1890, and by the city of New York, July 10, 1890.

The above cause having come on for hearing and determination before this court on the 27th day of January, 1891, on the application of Ballin, Joseph & Co., on the record and proceedings herein and on return of the board of general appraisers of the record and the evidence taken by them, with their certified statement of the facts involved therein, together with their decision thereon:

Now, after hearing Stephen G. Clarke, esq., and Edwin B. Smith, esq., on behalf of Ballin, Joseph & Co., and Henry C. Platt, esq., assistant U. S. district attorney, in opposition, now on motion of Stanley, Clarke & Smith,

49 It is ordered adjudged and decreed that the decision in respect to the merchandise herein by the collector of the port and affirmed by the board of appraisers, that the same was dutiable as woolen cloths costing under 80 cents, and the rate of duty thereupon imposed thereon accordingly be reversed and set aside and

It is further determined and adjudged that the correct denomination of said merchandise is "manufactures of worsted," and that duty should be assessed thereon under Schedule K of the act of March 3, 1883, as manufactures of worsted, and not otherwise.

E. HENRY LACOMBE.

(Endorsed:) No. 18. U. S. circuit court, southern district of New York. In the matter of the application of Ballin, Joseph & Co. upon certain merchandise entered by the Majestic July 3, 1890, by the City of Richmond July 21, 1890, and by the City of New York July 10, 1890. Judgment. Stanley, Clarke & Smith, attorneys for petitioners, 120 Broadway, N. Y. U. S. circuit court. Filed Mar. 2, 1891. John A. Shields, clerk.

50 United States circuit court, southern district of New York.

In the matter of the application of Ballin, Joseph, & Co. upon certain merchandise entered by the Majestic July 3, 1890, by the City of Richmond July 21, 1890, and by the City of New York, July 10, 1890. Suit No. 18.

The undersigned, on behalf of the collector of the port of New York, and on the part of the United States, hereby appeals from the decision of this court, entered on March 2nd, 1891, in the above-entitled proceeding, reversing the decision of the board of general appraisers, to the Supreme Court of the United States, and prays that this appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said decision was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated New York, March 2nd, 1891.

EDWD. MITCHELL,

U. S. District Attorney for the Southern District of New York.

(Endorsed:) U. S. circuit court, southern district of New York. In the matter of the application of Ballin, Joseph & Co. upon merchandise entered by Majestic July 3, 1890; City of Richmond July 21, 1890; City of New York July 10, 1890. Notice of appeal. Edward Mitchell, United States attorney. Due service of a copy of the within is hereby admitted. New York, Mch. 2, 1891. Stanley, Clarke & Smith, attorneys for Ballin, Joseph & Co. U. S. circuit court. Filed Mar. 2, 1891. John A. Shields, clerk.

51 U. S. circuit court, southern district of New York.

In the matter of the application of Ballin, Joseph & Co. upon certain merchandise entered by the Majestic July 3, 1890, by the City of Richmond July 21, 1890, and by the City of New York July 10, 1890. Suit No. 18.

To the circuit court of the United States for the southern district of New York:

The Attorney-General of the United States hereby applies for the allowance of an appeal to the U. S. Supreme Court from the decision and judgment of the U. S. circuit court rendered herein on the 2nd day of March, 1891.

Dated March 2nd, 1891.

W. H. H. MILLER,
Attorney-General.
Per EDWD. MITCHELL,
U. S. Atty.

The foregoing application is granted and appeal allowed.

Dated New York, March 2nd, 1891.

E. HENRY LACOMBE,
U. S. Circuit Judge.

52 (Endorsed:) No. 18. U. S. circuit court, southern district of New York. In the matter of the application of Ballin, Joseph & Co. upon certain merchandise entered by the Majestic July 3, 1890, City of Richmond July 21, 1890, City of New York July 10, 1890. Allowance of appeal, Edward Mitchell, United States Attorney. U. S. circuit court. Filed Mar. 2, 1891. John A. Shields, clerk.

53 UNITED STATES OF AMERICA, *ss:*

To BALLIN, JOSEPH & CO.,
(*Importers*):

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the third Monday of March, 1891, pursuant to an appeal on the part of the United States, filed in the clerk's office of the circuit court of the United States for the southern district of New York, to show cause, if any there be, why the decision of the U. S. circuit court in the said appeal mentioned should not be reversed, modified, or corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand at the city of New York, in the southern district of New York, on the 2nd day of March, 1891.

E. HENRY LACOMBE,
U. S. Circuit Judge.

(Endorsed:) U. S. circuit court, southern district of New York. In the matter of the application of Ballin, Joseph & Co. upon certain merchandise entered by Majestic July 3, 1890, City of Richmond July 21,

1890, City of New York July 10, 1890. Citation. Edward Mitchell, United States attorney, attorney for defendant. Due service of a copy of the within is hereby admitted. New York, Mch. 2, 1891. Stanley, Clarke & Smith, attorneys for Ballin, Joseph & Co. U. S. circuit court. Filed Mar. 2, 1891. John A. Shields, clerk.

54 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 53, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the matter of the application of Ballin, Joseph & Co. upon certain merchandise entered by the Majestic July 3, 1890, by the City of Richmond July 21, 1890, and by the City of New York July 10, 1890, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York in the second circuit, this thirteenth day of March, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the said United States the one hundred and fifteenth.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

(Indorsement on cover:) No. 1655. The United States, appellant, vs. Ballin, Joseph & Co. S. New York, C. C. U. S. Filed March 14, 1891.

Office Supreme Court U. S.
FILED.
NOV 28 1891
JAMES H. McKENNEY.

THE QUORUM CASE.

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

THE UNITED STATES, APPELLANT,
vs.
BALLIN, JOSEPH & CO. } No. 1061.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

W. H. H. MILLER,
Attorney-General.
WM. H. TAFT,
Solicitor-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1891.

THE UNITED STATES, APPELLANT,
vs.
BALLIN, JOSEPH & CO. } No. 1061.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

Ballin, Joseph & Co. are importers. They complain that the collector at New York collected, as duty upon sixteen cases of worsted cloths imported by them, more money than the law permitted, and seek to obtain a refund of the illegal excess. The board of United States general appraisers sustained the action of the collector, but the circuit court on appeal held with the importers

and gave judgment against the United States for the amounts claimed. The goods were imported in July, 1890, so that the duties on them were not affected by the tariff act approved October 1 of the same year. The question in the case is whether the act of Congress approved May 9, 1890, entitled "An act to provide for the classification of worsted cloths as woolens," had the effect to make the duty upon worsted cloths equal to that which the tariff act of March 3, 1883, imposed upon woolens. If the act of May 9, 1890, had such effect, the judgment of the circuit court should be reversed. If it had not, the judgment should be sustained. The parts of Schedule K (Woolen Schedule) of the act of March 3, 1883, which are to be considered here, are as follows (22 Stats., 508, 509):

> (1) Woolen cloths, woolen shawls, and all manufactures of wool of every description, made wholly or in part of wool, not specially enumerated or provided for in this act, valued at not exceeding eighty cents per pound, thirty-five cents per pound and thirty-five per centum ad valorem; valued at above eighty cents per pound, thirty-five cents per pound, and in addition thereto forty per centum ad valorem.
>
> (2) Flannels, blankets, hats of wool, knit goods, and all goods made on knitting-frames, balmorals, woolen and worsted yarns, and all manufactures of every description, composed wholly or in part of worsted, the hair of the alpaca, goat, or other animals, (*except such as are composed in part of wool*), not specially enumerated or provided for in this act, valued at not exceeding thirty cents per pound, ten cents per pound; valued at above thirty cents per

pound, and not exceeding forty cents per pound, twelve cents per pound; valued at above forty cents per pound, and not exceeding sixty cents per pound, eighteen cents per pound; valued at above sixty cents per pound, and not exceeding eighty cents per pound, twenty-four cents per pound; and in addition thereto, upon all the above-named articles, thirty-five per centum ad valorem; valued at above eighty cents per pound, thirty-five cents per pound, and in addition thereto forty per centum ad valorem.

The collector classified the worsted cloths under the first of the above clauses as woolen cloths made wholly or in part of wool, valued at not exceeding 80 cents per pound, and assessed a duty upon them of 35 cents per pound and 35 per cent ad valorem.

The importers contended that they should have been classified under the second of the above clauses as manufactures composed wholly of worsted valued at above 40 cents per pound, and not exceeding 60 cents per pound, and that they should have been assessed for duty accordingly at 18 cents per pound and 35 per centum ad valorem. If clauses (1) and (2) above quoted were in force in July, 1890, unamended, the claim of the importers must be sustained under the decision of Judge Lacombe in *Ballin* vs. *Magone* (41 Fed. Rep., 921) and the decision of this court in *Seeberger* vs. *Cahn* (135 U. S., 95), where it was held that cloths made of worsted, though worsted was wool, were not dutiable as woolen cloths under clause (1), but as manufactures of worsted under clause (2). The collector in his classification and assessment in this case

acted under the following circular of the Secretary of the Treasury. (Synopsis of Treasury Decisions, 1890, p. 219):

[Circular 10020.—Worsted cloths.]

TREASURY DEPARTMENT, *May* 13, 1890.

To collectors and other officers of the customs:

The following act of Congress, approved May 9, 1890, is herewith published for the information and guidance of all concerned:

"AN ACT providing for the classification of worsted cloths as woolens.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Treasury be, and he hereby is, authorized and directed to classify as woolen cloths all imports of worsted cloth, whether known under the name of worsted cloth or under the name of worsteds, diagonals, or otherwise."

GEORGE C. TICHENOR,
Assistant Secretary.

The foregoing act was approved May 9, 1890, and is now duly enrolled among the laws of the United States in the office of the Secretary of State. It is signed by the presiding officers of both Houses and by the President, and has been published by the Secretary of State, as required by law, among the laws of the United States (26 Stat., chap. 200, p. 105). The merchandise in suit was not classified personally by the Secretary of the Treasury, nor did he issue any order affecting the classification of these particular cases other than the circular above given.

The question was not submitted to him on appeal, because, under the customs administrative act of June 10, 1890, an appeal from the decision of the collector to the Secretary as to classification for duty was abolished and these goods were imported, as has been said, in July of that year. Judge Lacombe held that the act of May 9, 1890, did not affect the classification of these goods, because the Secretary of the Treasury had not acted with respect to their classification. (See Opinion of Lacombe, J., Appendix, p. XVII; S. C., 45 Fed. Rep., 170–174.) The opinion of Judge Somerville, speaking for the board of United States general appraisers on the same question, upholding the view of the United States herein, will also be found in the Appendix, p. VII, and is reported in the synopsis of Treasury decisions for the year 1890 (p. 474, S. D. 10336, G. A., 57).

CONTENTION OF THE IMPORTERS.

The position of the importers, as gathered from their protests (pages 9, 12, and 14 of the Record) is—

(1) That the act of May 9, 1890, never acquired the validity of a law, because there was not a constitutional quorum to do business in the House of Representatives when the bill is said to have passed that body.

(2) That even if the act was in force as a valid law in July, 1890, when these importations were made, its language could not be construed to amend the clauses of the tariff act of March 3, 1883, above referred to, because the act of May 9, 1890, did not purport to repeal any act imposing the preëxisting rate of duty on worsted cloths, or

to impose any new duty thereon; and because, whether or not the Secretary of the Treasury classified the goods in suit as woolen cloths, this did not alter the fact that they were manufactures of worsted and dutiable accordingly under the act of 1883.

(3) That even if the act of May 9, 1890, amended the woolen and worsted schedule of the act of 1883, by its terms it only did so with respect to such worsted cloths as the Secretary of the Treasury himself should classify; and that, as the Secretary did not classify the importations in this case, the duties herein were unaffected by the amendment.

SYNOPSIS OF ARGUMENT FOR THE UNITED STATES.

A.

CONCERNING THE PASSAGE OF THE ACT.

1. The enrolled act, signed by the presiding officers of the two Houses and by the President, and deposited with the Secretary of State for careful preservation by him, is the ultimate record of the law, is the best evidence of its passage, and, when complete, is not impeached by contradictory or inconsistent entries in the Journals of Congress.

2. Even if the Journals, as evidence of the nonpassage of acts, control and overcome the presumption of validity from the enrolled act, they show in this case the presence of a constitutional quorum to do business in the House of Representatives at the time the bill in question was put on its passage and they show that the bill passed.

a. The *presence* of a majority of the members of either House constitutes a quorum to do business. Members if present are a part of the required quorum to do business, though they do not vote. This is shown, first, by the context of the Constitution providing, in effect, that a quorum to do business may be obtained by compelling the *presence* of absent members; second, by the history of the clause in the constitutional convention; and, third, by the common law meaning of the term "quorum."

b. Each House, by virtue of its constitutional power to determine the rules of its proceedings (sec. 5, clause 2), may ascertain the presence of a quorum by any means or agency it chooses to select, and after such ascertainment the House, by virtue of its power to keep a journal of its proceedings (sec. 5, clause 3), may, as it did here, make the Journal show the truth, and thereby conclusively establish the fact of the presence of a quorum.

c. The bill received the affirmative vote of a majority of the quorum, and was lawfully passed.

B.

CONCERNING THE EFFECT OF THE ACT, IF VALID.

1. The act of May 9, 1890, directs the Secretary of the Treasury "to classify as woolen cloths all *imports* of worsted cloth." The verb "to classify" when used in connection with imports means to construe the tariff law with reference to its application to the imports in question, and thus to classify them under the clause or clauses of the

law by which the duty on them is to be assessed. The direction to the Secretary in the act of May 9, 1890, is to so construe the tariff law of March 3, 1883, that the clause which applies to woolen cloths shall apply to worsted cloths, and thus that the same duty shall be assessed upon the latter as the former. The construction thus enjoined is repugnant to the act of March 3, 1883, as interpreted by the Supreme Court. Congress had full power to expressly or impliedly repeal or amend the act of 1883. The act of May 9, 1890, is, therefore, an implied amendment of the act of 1883 and the worsted clause thereof, to the extent of imposing the same duty upon imported worsted cloths as upon woolen cloths.

2. The Secretary of the Treasury is the head of that Department which is charged with the duty of enforcing customs laws, and, therefore, of primarily construing them, and of classifying imports for duty under them. By statute, this is all done under the general supervision of the Secretary. A legislative direction to him to give a certain construction to customs law is, therefore, exactly equivalent to a provision that the law shall thereafter generally receive such construction. It can not be supposed that Congress intended the Secretary to give one construction, and his subordinates to give another.

To say, as was held by Judge Lacombe, that the effect of the act of May 9, 1890, is to impose the same duty on worsted cloths as on woolens, *only* in cases where the particular worsteds are classified by the Secretary of the Treasury, or under his express direction, leads to the

absurd result that the same kind of worsteds would pay different rates of duty, as they might or might not be classified by the Secretary. This would be a violation of the clause of the Constitution requiring uniformity of taxation, and would seem to delegate to the Secretary an undefined and irresponsible power, by action or non-action in regard to any particular importation, to change the legal rate of duty thereon. Such construction can not be tolerated if any other is possible.

3. The conditions existing when the act was passed and leading to its passage, leave no doubt of the intention of Congress to impose, thereby and thereafter, the same duty upon all worsted cloths as was imposed by the act of 1883 upon woolen cloths. The court may give effect to this intention without doing violence to the language used.

ARGUMENT.

A.

CONCERNING THE PASSAGE OF THE ACT.

I.

We contend on behalf of the United States that the duly enrolled act, signed by the presiding officers of both Houses, approved by the President, and deposited with the Secretary of State, and under his direction published among the laws of the United States, is the ultimate record of the law, and the best evidence of its passage. Entries on the Journals of either House, though within the judicial knowledge of the court, do not impeach or contradict the presumption from the completed record of the properly enrolled act, that it was constitutionally passed.

We have examined this question at much length and in great detail in a brief already presented to the court in the so-called Tariff Act Cases, involving the validity of the act of October 1, 1890, Nos. 1049, 1050, and 1052 on the present docket of this court. (See pages of brief for the United States therein, 9 to 29 inclusive.) We respectfully refer to the reasons there given and the authorities there cited in support of our contention on this point.

In our brief in the Tariff Act Cases we referred to the numerous acts of Congress providing for the evidence of

laws. In the list, however, we failed to cite section 8 of the act approved June 20, 1874 (18 Stat., 114), providing that printed copies of the acts of each session and the bound copies of the acts of each Congress shall be published under the direction of the Secretary of State, and shall be legal evidence of the laws and treaties therein contained in all courts of the United States, and of the several States therein. This we now call to the attention of the court.

II.

Conceding, for the sake of argument, that the journals may be used to impeach the record of the enrolled act, how does the case stand? The act approved May 9, 1890, was entitled "An act providing for the classification of worsted cloths as woolens." On pages 549 and 550 of the Journal of the House of Representatives of the first session Fifty-first Congress, in the proceedings of April 30, 1890, we find the action of the House when a bill thus entitled, and numbered "H. R. 9548," was put upon its passage. It there appears that when the question was put, Shall the bill pass? and the yeas and nays were demanded, 138 members of the House voted for the passage of the bill, and no members voted against it.

The Speaker announced, from a list noted by the Clerk at the suggestion of the Speaker, 74 members as present in the hall when their names were called and not voting. The Speaker thereupon stated that the said members present and refusing to vote, 74 in number, together with

those recorded as voting, 138 in number, showed a total vote of 242 members present, constituting a quorum present to do business, and that the yeas being 138 and the nays none, the bill was passed. The names of the members present and not voting are spread upon the Journal. (See Appendix page III). The announcement, made by the Speaker, was in accordance with clause 3 of Rule 15 of the Rules of the House of Representatives, Fifty-first Congress, adopted February 14, 1890 (see Journal of the House of Representatives, pp. 226 to 233), which is as follows:

> On the demand of any member, or at the suggestion of the Speaker, the names of members sufficient to make a quorum in the hall of the House who do not vote shall be noted by the Clerk and recorded in the Journal, and reported to the Speaker with the names of the members voting, and be counted and announced in determining the presence of a quorum to do business.

One hundred and sixty-seven members were a majority of all those elected to the House of Representatives of the Fifty-first Congress, so that 167 members were a quorum to do business. The number of members present in the hall of the House at the time the bill passed is shown by the Journals to have been 212. The number necessary to constitute a quorum therefore was present.

a.

It is said by the importers, however, that Rule XV, cl. 3, is invalid because the words of the Constitution, "A majority of each shall constitute a quorum *to do business*,"

mean that every member of the quorum shall vote when his name is called, or else that he is not doing business, and therefore does not make one of a quorum "to do business." The words "to do business" are supposed to limit the meaning of the word "quorum," so as to require this construction. The next sentence in the same clause is a complete answer to the contention. It is—

> But a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members in such manner and under such penalties as each House may provide.

Plainly the intention was that a quorum should be restored and constituted by the enforced presence of absent members. It was the absent members that prevented the quorum, not the refusal of members, though present, to take part in the proceedings or to admit on the record their visible presence.

Mr. Justice Story was evidently of the opinion that the power to compel the attendance of absent members was a complete remedy for the evil of obstruction by means of breaking a quorum, for he says (section 836, Story on the Constitution, fifth edition, vol. 1):

> But as a danger of an opposite sort required equally to be guarded against, a smaller number is authorized to adjourn from day to day, thus to prevent a legal dissolution of the body, and also to compel the attendance of absent members. Thus the interests of the nation and the despatch of business are not subject to the caprice or perversity or negligence of the minority. It was a defect in the articles of confederation, sometimes productive of great public mischief,

that no vote, except for an adjournment, could be determined unless by the votes of a majority of the States; and no power of compelling the attendance of the requisite number existed.

How futile and nugatory would be this power to compel the attendance of members if, after they are brought in by process of the House, they could by refusing to vote as effectually break the quorum as if the Sergeant-at-Arms had never found them.

But it is said that the House may, under the Constitution, make a rule requiring every one present to vote, and enforce the rule by punishment for its violation. This ignores the plain distinction between avoiding the effect of a violation of a rule and punishing it. The length to which legislators will go to defeat a bill suggests that no punishment likely to be devised, would deter a dissentient and turbulent minority from violating the rule to accomplish their purpose.

But more than this, the power of the House to punish its members can neither be delegated nor exercised by a minority. If the framers of the Constitution had intended such a power to be used in obtaining a quorum they would have given it to the present minority as they did the power to compel the attendance of the absent. If members present remain silent and break the quorum to defeat a bill, is it likely that they will vote and make a quorum on the question whether punishment shall be inflicted on any one of their number for refusing to vote on the bill?

The history of the clause in the Constitutional Convention only emphasizes what is so plain on the face of the Constitution itself, that to make one of a quorum, the presence of the member is all that is necessary. The debate as reported in the Madison Papers, 5 Elliott's Debates, second edition, page 405, we have given in the Appendix, page XVIII. The form in which the clause fixing the number of a quorum was reported to the convention and was discussed is to be found on page 378 of 5 Elliott's Debates, as follows:

> In each House a majority of the members shall constitute a quorum to do business, but a smaller number may adjourn from day to day.

As will be seen from the debate, Mr. Gorham and Mr. Mercer objected to fixing the number so high as that of a majority of the members elect, anticipating great delay in business and great inconvenience from the future increase of members. Mr. Mercer said that it would "put it in the power of a few by seceding at a critical moment to introduce convulsions and endanger the Government." He said that examples of secession had already happened in some of the States. Mr. Gouverneur Morris moved to fix the quorum at 33 in the House and 14 in the Senate, which was a majority of the then number of those bodies. He suggested that by fixing the number low the members would generally be induced to attend, knowing that advantage might be taken of their absence. He said that "the secession of a small number ought not to be suffered to break a quorum. Such events in the States may have been of little con-

sequence. In the national councils they may be fatal. * * * If a few can break up a quorum, they may seize a moment when a particular part of the continent may be in need of immediate aid, to extort, by threatening a secession, some unjust and selfish measure." Mr. King suggested a substitute for the motion, which, instead of fixing the number proposed by Mr. Morris as quorums, made those the lowest numbers, leaving the two bodies at liberty to increase them or not.

Mr. Mercer agreed to substitute Mr. King's motion in place of Mr. Morris's. Mr. Ellsworth opposed the motion because he thought it would be a ground of confidence to the people that no law or burden should be imposed on them by a few men. He said: "The inconvenience of secessions may be guarded against by giving to each house an authority to require the attendance of absent members." On the question of Mr. King's motion the vote was 2 aye and 9 no. Then Mr. Randolph and Mr. Madison moved to add to the end of article 6, section 3, the words "and may be authorized to compel the attendance of absent members in such manner and under such penalties as each house may provide," which was agreed to by all except Pennsylvania, which was divided. And then article 6, section 3, was agreed to as amended, *nem. con.*

The debate shows that the Convention intended to obviate the danger of obstruction arising from the ease with which so large a quorum could be broken, by giving to less than a quorum the power to compel the absent to attend. It would wholly defeat such intention to require that the quorum should include only those who were will-

ing to vocally take part in the business. It was obvious to the members of that body, as it must be to everyone, that if legislators who, for the purpose of defeating legislation, were willing to resort to the extreme measure of leaving the assembly to break a quorum, returning only under forcible compulsion, could attain their object by mere silence, they would do so. The only way suggested in the convention of breaking a quorum was by withdrawals. This of itself is conclusive evidence that, in the view of the members of that body, silence could not effect the same result, because if it could, what need for the obstructors to withdraw?

The danger of serious obstruction by breaking a quorum was fully appreciated, as we have seen, by the founders of this Government. It is impossible, therefore, that they should have used the word "quorum" in a sense which would give an obstructing minority more power than was ever enjoyed by one before, and which it never had at common law. The word had already acquired a definite meaning at common law when the Constitution was adopted. It was the number of a definite limited body which could do business. Therefore, the expression "a quorum to do business" was merely an elaboration of the meaning of the word "quorum" itself, and the Constitution would have meant exactly the same had the words "to do business" been left out. The central idea in the term is the attendance or presence of enough of the members of a definite limited body to so completely represent the whole body as that a majority of those pres-

ent can do acts which shall in law be the acts of the entire body. It is the presence of the necessary number, not their active participation, which makes a quorum. The leading law lexicons leave no doubt upon this point.

In Wharton's Law Lexicon (p. 688) a quorum is defined to be—

> The number of members of an administrative or judicial body *whose presence* is necessary for the acts of the body to be valid.

In Abbott's Law Dictionary (p. 375) it is said "quorum," employed as an English substantive—

> Signifies the number of persons belonging to a legislative, corporate, or other body, *whose presence* is necessary for the transaction of business by such body.

Rapalje & Lawrence Law Dictionary, 2 vol., 1059—

> Quorum.—When a committee, board of directors, meeting of shareholders, legislative, or other body of persons, can not act *unless a certain number at least of them are present*, that number is called a quorum.

Black's Law Dictionary, and Sweet's Law Lexicon give the same definition.

The derivation of the term and the authorities point with equal force to the same conclusion.

The word "quorum" is the genitive plural of the Latin relative *qui*, and acquired its meaning from its use in commissions issued by the king to justices of the peace, the presence of one of whom at the judicial hearing was made necessary in order that the judgment should be valid. There was a similar form in municipal charters describing the governing body and its powers.

In the case of *Regina* vs. *The Bailiffs, Burgesses, and Commons of the Town of Ipswich* (Ld. Raym.'s Repts., 1232; s. c., 2 Salk., 434), the charter of the town provided for the election of a recorder, who should continue in office during his natural life, unless for malfeasance in that office, or for any of five other reasonable grounds, he should be removed "*per ballivos, burgenses, et communitatem, etc., pro tempore existentes, vel per majorem partem eorum, quorum ballivos, etc., duos esse edixit*,"—by the bailiffs, burgesses, and commons for the time being, or the greater part of them, of whom he wished the bailiffs to be two. The question arose whether such a charter required the consent of the two bailiffs who were thereby made the quorum, and it was held that their presence was all that was necessary to validate the proceedings.

So in the case of *Sir Robert Salisbury Cotton* and *Davies* (1 Strange, 52) the charter of Denbigh provided that there should be two bailiffs, two aldermen, and twenty-five capital burgesses, and the direction as to the election of the capital burgesses was in these words:

> And if it happen any of the said capital burgesses to die or be removed, then it shall be lawful for the bailiffs, aldermen, and capital burgesses for the time being, or the major part of them, *quorum unum ballivorum et unum aldermannorum duos esse volumus*, to elect another.

Lord Kenyon said:

> In this case there is nothing required but the *presence* of one bailiff and one alderman at every election; and they have no negative votes;

to which the rest of the court agreed.

In *Oldknow* vs. *Wainright*, the title of a feigned issue growing out of a case known as *Rex* vs. *Foxcroft* (2 Burrows, 1017), Lord Mansfield said:

> Whenever electors are present and don't vote at all, (as they have done here), they virtually acquiesce in the election made by those who do.

In *The King* vs. *Bellringer* (4 Term Repts., 823) Lord Kenyon, referring to the language of Lord Mansfield in *Rex* vs. *Varlow* (Cowp., 250), where Lord Mansfield distinguished between the rule as to definite and indefinite bodies, says:

> It appears to me, therefore, that it was his opinion and that of the court that where there is a definitive body there must exist at the time when the act is done a major part of that definitive body; it is not necessary indeed that they should all concur in the election or other act done; but they must be *present*, and the election at such meeting is in point of law an election by the whole.

This language was approved and affirmed by the same court in *King* vs. *Miller* (6 Term Repts., 268).

In *Rex* vs. *Monday* (2 Cowp., 530) the question was whether an alderman was duly elected. Lord Mansfield says:

> I will take it for granted that a majority of the mayor and aldermen for the time being was sufficient to constitute the corporate assembly; and the fact found by the special verdict is that the majority of those in being did meet. When the assembly are *duly met* I take it to be clear law that the corporate act may be done by the majority of those who have once regularly constituted the meeting.

In *Ex parte Wilcocks et al.* (7 Cowen, 402–409) the court say:

> The general rule also is that to make a quorum of a select and definite body of men possessing the power to elect, a majority at least must be *present*, and then a majority of the quorum may decide.

So in the case of *Commonwealth* vs. *Green* (4 Wharton, 531, 581), the Supreme Court of Pennsylvania though it set aside the verdict on the ground that the evidence did not support it, held that the charge of Judge Rogers to the jury stated the law correctly. The question there was, whether the fact that many members of the general assembly of the Presbyterian Church did not vote on a certain motion, prevented the vote from being the act of the assembly. Upon this point Judge Rogers charged as follows:

> I wish you also to understand that it is the majority of members that had been enrolled that must determine this question. When there is a quorum of members present the moderator can only notice those who actually vote, and not those who do not choose to exercise their privilege of voting. "Whenever," says Lord Mansfield, "electors are present and don't vote at all, they virtually acquiesce in the decision of those who do."
>
> And with this principle agrees one of the rules of the General Assembly itself, which must be familiar to every member.
>
> "Members (30th rule) ought not, without weighty reasons, to decline voting, as this practice might leave the decision of very interesting questions to a small proportion of the judicatory. Silent members, unless excused from voting, must be considered as acquiescing with the majority."

> This is not only the doctrine of the common law, of the written law, as you have seen, but it is the doctrine of common sense, for without the benefit of this rule it would be almost impossible, certainly very inconvenient, to transact business in a large deliberative assembly.

The rule is stated in 5 Dane's Abridgment, p. 150:

> When a corporation is composed of a definite number, and an integral part of it is required to vote in an election, a majority of such integral definite part must attend, *aliter* there is no elective assembly; but a majority of those *present* when legally met will bind the rest.

See also Wilcock on Municipal Corporations (p. 216, section 546). Grant on Corporations, 71; Angell & Ames on Corporations, §§ 126, 127; 2 Kyd on Corporations, 12, 13; *State* vs. *Green* (37 O. S., 227); *Launtz* vs. *The People* (113 Ill., 137); *Booker* vs. *Young* (12 Gratt., 307); *Inhabitants of the First Parish* vs. *Stearns* (21 Pickering, 148).

In *Damon* vs. *Granby* (2 Pick., 345) the legality of the acts of a committee appointed by the town to superintend the building of a meeting house was in question. A majority of the committee being present, and a difference arising, enough of the members had withdrawn from the meeting to reduce the number present below a majority of the committee. Chief Justice Parker, speaking for the Supreme Judicial Court of Massachusetts, held that the acts of the remaining minority were invalid, but stated the rule as follows:

> Now, the jury have found that two of the newly appointed members were prevented from taking part

in the deliberations, and that they, with six of the old members, withdrew. The minority left under these circumstances had no power to act or decide. *It is true that all the members being assembled, or perhaps if only duly notified, a majority of those present have authority to proceed if a majority of the whole number are present.* But we can not think that if a major part withdraw in the belief that they, or one of them, are to be prevented from acting, the minority can assume the powers of the whole body. *A major part of the whole is necessary to constitute a quorum, and a majority of such quorum may act.*

In *The State* vs. *Deliesseline* (1 McCord, 52) Mr. Justice Nott, in delivering the judgment of the court, that the vote of a majority of a majority present of the managers of an election was binding upon the whole body, said:

> The conclusion then follows that a majority must constitute a quorum to transact the business; and that decision is conclusive of the other question. For, according to the principle of all the cases referred to, a quorum possesses all the powers of the whole body, a majority of which quorum must of course govern. * * * The constitutions of this State and of the United States declare that a majority shall be a quorum to do business; but a majority of that quorum are sufficient to decide the most important question. It has already been stated that eleven constitute a quorum of the board of trustees of the college, which is composed of twenty-nine members; six constitute a majority of that quorum, and the concurrence of that number, *when only eleven are present*, has always been held conclusive on the whole body.

In *Wells* vs. *Railway Co.* (19 N. J. Eq., 402), it is stated:

> A majority of the directors of a corporation, in the absence of any regulation in the charter, is a quorum, and a majority of such a quorum *when convened* can do any act within the power of the directors.

Again, on page 404, it is said:

> At this meeting, three of the five directors were present, and although there is some proof that the entry is incorrect in stating that all three concurred in the resolution, yet it appears that two did concur unconditionally, and as of five directors three are a quorum, and two a majority of three, the resolution must be taken as valid and binding.

In *Rushville Gas Company* vs. *City of Rushville* (121 Ind., 206), the matter under consideration was the effect of a vote of the common council accepting a contract to bind the city. Three of the six members composing the council voted in favor of the resolution of acceptance; the other three members though present declined to vote. It was held that the resolution was legally adopted. Judge Elliott, speaking for the court, said:

> The rule is that if there is a quorum present, and a majority of the quorum vote in favor of a measure, it will prevail, although an equal number should refrain from voting. It is not the majority of the whole number of members present that is required; all that is requisite is a majority of the number of members required to constitute a quorum. If there had been four members of the common council present, and three had voted for the resolution, and one had voted against it, no one would hesitate to affirm

that the resolution was duly passed, and it can make no difference whether four or six members are present, since it is always the vote of the majority of the quorum that is effective. The mere presence of inactive members does not impair the right of the majority of the quorum to proceed with the business of the body. If members present desire to defeat a measure they must vote against it, for inaction will not accomplish their purpose. Their silence is acquiescence rather than opposition. Their refusal to vote is in effect a declaration that they consent that the majority of the quorum may act for the body of which they are members.

In the case of *Attorney-General* vs. *Shepard* (62 N. H., 383) the question was whether an amendment to a city charter had been properly adopted by the board of aldermen. All the members of the board were present but one. The ordinance was duly read and put to a vote, and declared by the chair to be passed. The yeas and nays were then called; three voted in the affirmative, three refused to vote, and the chair declared the ordinance passed. One of the three who refused to vote was the member who called for the yeas and nays, and these facts appeared in the journal of the board. During the calling of the yeas and nays, the chair read section 9 of the rules of the board, which required every member who was present when a question was put, to vote, unless excused by the board. It may be noted in passing that rule 8 of the House of Representatives of the Fifty-first Congress enjoined the same duty upon the members of that body. In the case cited, the chair also requested each of the three nonvoting members to vote and each

of them refused to do so. The court held, Chief Justice Doe delivering the opinion, that the amendment to the charter was legally adopted by the board of aldermen. He said:

> The exercise of law-making power is not stopped by the mere silence and inaction of some of the law-makers who are present. An arbitrary, technical, and exclusive method of ascertaining whether a quorum is present, operating to prevent the performance of official duty and obstruct the business of government, is no part of our common law. The statute requiring the presence of four aldermen does not mean that in the presence of four a majority of the votes cast may not be enough. The journal properly shows how many members were there when the vote was taken by yeas and nays; there was no difficulty in ascertaining and recording the fact; and the requirement of a quorum at that time was not intended to furnish a means of suspending the legislative power and duty of a quorum. No illegality appears in the adoption of the amendment.

In Horr & Bemis on Municipal Police Ordinances, section 43, the rule is stated as follows:

> When a quorum is obtained, the body may then proceed to the transaction of business, and unless contrary to the express provision of the organic law of the corporation, an ordinance is properly passed for which a majority of the quorum have voted. * * * Those who are present and who help to make up the quorum are expected to vote on every question, and their presence alone is enough to make the vote decisive and binding, whether they actually vote or not.

The same principle has been affirmed by this court in the case of *Brown* vs. *District of Columbia* (127 U. S.,

579), in which Mr. Justice Lamar, delivering the opinion of the court, used the following language (page 586):

> The rule on this subject has been well stated by Dillon in his work on Municipal Corporations, section 283, as follows:
>
> "As a *general rule* it may be stated that not only where the corporate power resides in a *select body*, as a city council, but where it has been delegated to a *committee* or *agents*, then, in the absence of special provisions otherwise, a *minority* of the select body, or of the committee or agents, are powerless to bind the majority or do any valid act. If all the members of the select body or committee, or if all of the agents are assembled, or if *all* have been duly notified, and the minority refuse or neglect to meet with the others, a majority of those *present* may act, provided those present constitute a majority of the whole number. In other words, in such a case, a major part of the whole is necessary to constitute a quorum, and a majority of a quorum may act. If the major part withdraw so as to leave no quorum, the power of the minority to act is, in general, considered to cease."

It is sufficiently established by the foregoing authorities that at common law the presence of a quorum validates the act of its majority as the act of the entire body. It is not required that a quorum shall act, but only that a majority of the quorum present shall act.

Attempts will be made to distinguish some of the cases that have been cited from the issue under discussion by the claim that they were election cases, and that as to elections a different rule prevails from that necessary in the transaction of business or the adoption of measures. It is true

that with respect to elections a different rule applies as to the number of votes required to elect the successful candidate. In elections at common law a majority of votes was not necessary, but only a plurality. It therefore followed that if a quorum was present, a candidate might be elected by less than a majority of the quorum, and the silence of a majority of the quorum, or a vote by them for a disqualified candidate, did not prevent the election of the qualified candidate, receiving the highest vote. It was, however, always necessary at common law, in order to validate an election in a definite body, to have a quorum. Lord Mansfield expressly held this to be the law in the case of *Rex* vs. *Monday* (2 Cowp., 537), in which he was supported by the statement of Mr. Justice Ashton in the same case. On the question whether voting, or presence only, makes a quorum, therefore, election cases are entirely in point. Moreover, many of the cases cited above are where business was done or measures were adopted, and they are ample to show that presence of the required number at the place of meeting is all that is necessary to make a quorum.

What grounds are advanced to maintain a different view? "The precedents of one hundred years" are said to establish that on a vote where the yeas and nays are taken there is no quorum unless the members voting equal or exceed a majority of all the members elected. These precedents consist of decisions by successive presiding officers under rules of procedure established by the Houses of Congress. The decisions were not constructions of the Constitution. Had they been, such a long course of legislative interpre-

tation might be a serious obstacle in our argument. They were merely decisions that, under the rules of procedure then in force, the only mode of ascertaining the presence of a quorum, when the yeas and nays were taken, was by the number of votes cast. The first of the standing rules of the House of Representatives adopted April 7, 1789 (Jefferson's Manual, 1865, page 157), and in force continuously to the present day, provides that the Speaker—

> Shall take the chair every day precisely at the hour to which the House shall have adjourned on the previous day; shall immediately call the members to order; and, on the *appearance* of a quorum, shall cause the Journal of the preceding day to be read.

Thus it is evident that under the rules the *presence* of a majority of the House has always enabled the House to begin business without any further expression by the attendant members of their intention to take part in it, and that their number, in the first instance, is ascertained by the Speaker. It will hardly be claimed that a quorum is any less necessary to a lawful reading of the Journal than to the passage of a bill. Both are business of the House. Nor will the claim bear examination that the Constitution requires a different kind of a quorum for the passage of a bill from that required for the reading of the Journal. The quorum is "to do business," and no distinction is made as to the kind of business.

It follows from this that there has been no legislative interpretation of the meaning of the phrase "a quorum to do business" in the Constitution. The precedents, re-

ferred to, were rules of procedure for ascertaining the presence of a quorum. A mere rule of procedure however ancient is as completely subject to amendment or repeal as if it had been in force for only one session, for by the Constitution each House is given complete power to enact its own rules of procedure.

In the public discussion of this question much reliance has been placed by opponents of Rule XV on those clauses in the Constitution requiring the yeas and nays to be taken and recorded in the Journals. Upon the demand of one-fifth of a quorum the yeas and nays are to be taken on any question and recorded; and after a veto, the yeas and nays on the question, "Shall the bill pass notwithstanding the objections of the President?" are also required to be taken and recorded. In the latter case, the bill fails unless approved by two-thirds of each House. It is said that under Rule XV, if the presence of a quorum is ascertained by the Clerk and Speaker, a bill could be passed over the veto of the President by a vote of two yeas and one nay. No such result arises from the enforcement of the rule. It does not attempt to fix how many votes shall pass a bill in the first instance, or over a veto. It only prescribes the method of determining the presence of a quorum when a bill is being voted on. The number of votes and the proportion of the quorum necessary to pass the bill are questions to be decided under the Constitution without reference to the rule for counting a quorum.

Two-thirds of each House is, of course, two-thirds of a quorum of each House. This has been decided over and over again in Congress. See also Cooley's Constitutional

Limitations, 6th ed., p. 168; also *Warnock* vs. *Lafayette* (4 La. Ann., 419); *Southworth* vs. *Palmyra, etc., R. R. Co.* (2 Mich., 287); *State* vs. *McBride* (4 Mo., 303); *Satterlee* vs. *San Francisco* (22 Cal., 314). There is no difficulty at all in determining whether two-thirds of the House vote for the bill under Rule XV. The journal will show a quorum present, and the voters and the non-voters. The ayes must equal two-thirds of a quorum in order to pass the bill. In like manner it will appear, from a journal kept in accordance with Rule XV, whether on the passage of a bill in the first instance a majority of a quorum voted in its favor or not.

It is not exactly accurate to say that the practice of Congress under the old rules uniformly limits a quorum to those voting when the yeas and nays are called. Take the case suggested by Mr. McLane, of Maryland, in the Forty-sixth Congress (Record, Vol. 10, part 4, p. 379). Suppose a member asks to be excused from voting, and that appears upon the Journal. Such member would certainly be included to make a quorum under the old rules of the House. This was asserted by Mr. McLane on the floor of the House of the Forty-sixth Congress and when it was repeated by Maj. McKinley on the floor of the House of the Fifty-first Congress (Cong. Record, Vol. 21, part 1, p. 983) it does not appear to have been disputed. The member excused would be so included because the Journal records his presence, and explains his failure to vote.

The old rule, under which those present, not voting and not excused, were not counted in the quorum, proceeded on the presumption that every member would obey

the rule of the House requiring him, if present, and unless excused by the House, to vote. The violence of this presumption induced the House of the Fifty-first Congress not to entertain it further, and instead of it, to prescribe a means of ascertaining the exact truth. The abuses to which the old rule led, it is not necessary to dwell upon. The rule enabled the opponents of a measure, present in the body, to accomplish far more toward its defeat by silence, than by voting against it.

The rule does not exist in many State legislatures. We have the authority of Hon. Thomas B. Reed for saying that the presence of a quorum on the passage of measures is now determined in many legislatures by adding to those voting, those present who do not vote. See Vol. 150, North American Review (number for March, 1890), pages 387, 388. Such a course seems to be authorized in the legislatures of New York, Tennessee, Ohio, Michigan, Massachusetts, Kentucky, and Virginia.

In the more recent works on parliamentary procedure the propriety of the course required by Rule XV is fully recognized. Thus in "Principles of Procedure in Deliberative Bodies," by George Glover Crocker, the president of the Massachusetts senate in 1883, p. 116, we find the following:

> *If a quorum is present, vote valid, though less than a quorum votes.* It may be laid down as a general rule that it is the duty of every member of an organization not only to be present at its meetings, but also to vote upon the questions which arise. Hence it is that a vote is valid and binding upon the assembly, if a quorum of the assembly is present, even

though a quorum does not vote. * * * In all cases, however, where on a counted vote it appears that a quorum has not voted, the presumption is thereby raised that a quorum is not present, and unless this presumption is overthrown the vote must be considered void. This presumption can be overthrown by proof that a quorum was actually present at the time when the vote was taken; and if it is so overthrown, then the vote is valid. If a quorum does not vote, but is in fact present, the secretary should make an entry in the records that on a count of the assembly it was found that a quorum was present.

b.

Under the second clause of section 5 of the first article of the Constitution, each House may determine the rules of its proceedings. The ascertainment of a quorum is part of the procedure of the House. In the absence of any constitutional restrictions, the power of each House to determine its rules of procedure includes a power to prescribe the mode of ascertaining the presence of a quorum. The fact, if it be a fact, that more mistakes are likely to occur under a count by the Clerk than if members responded to their names, is immaterial. The question of the wisdom of a rule of procedure is entirely within the judgment of each House, and has no bearing upon the power to make it.

Each House is required to keep a Journal of its proceedings. It will hardly be denied under this injunction, that the House has the power to make the Journal speak the truth. It may, therefore, require that the names of

those members who are present and do not vote on a question, and the presence of whom is noted by the Clerk and Speaker, shall be recorded in the Journal.

We have thus shown, as we think, first, that the *presence* of a majority of the members elected makes a constitutional quorum to do business, and that voting or other participation in the business is not essential; second, that under the power of each House to make its rules of procedure, it may prescribe that the presence of the quorum shall be ascertained by the Clerk or Speaker; and third, that under the injunction to keep a journal, the House may make the Journal show the presence, thus ascertained, of members present and not voting. Rule XV is, therefore, constitutional.

The question of the validity of Rule XV of the House of Representatives for counting a quorum has been much discussed in Congress and in public reviews. The debates on the general subject will be found in the Congressional Record, Vol. 10, part 1, second session Forty-sixth Congress, p. 575–779, and in Vol. 21, part 1, first session Fifty-first Congress, p. 950–960 and 981–983. The most complete discussion of the subject will be found in the March, July, August, and September numbers of the North American Review for 1890. This includes two articles by Hon. Thomas B. Reed, one by Hon. J. G. Carlisle, one by "X. M. C." one by "A Democratic Leader," and one by Reginald F. D. Palgrave, C. B., clerk of the English House of Commons. We wish also to call particular attention to the very able opinion upon this question of the learned jurist, Judge Somerville,

which we have given in the Appendix, page VII. We are entirely content to to rest our case on his forcible exposition of the fallacy of the opponents of Rule XV.

See also "Quorum in European Legislatures" North American Review, for December, 1891.

The question remains to be considered whether the bill was passed by the 138 votes in its favor and none against it. The number shown by the journals to be present in the House when the bill passed was 212. One hundred and sixty-seven was a quorum. Eighty-four would be a majority of a quorum. One hundred and seven was a majority of those shown by the Journal to be present. The vote cast for the bill was 54 more than a majority of a quorum and 31 more than a majority of the members present.

It has sometimes been said that when a quorum is present, a measure is passed, if it is voted for by a majority of those who vote. Glover on Parliamentary Procedure, section 114; *Supervisors* vs. *Heenan* (2 Minn., 321). In the latter case Judge Flandrau said:

> "Previous to the constitution [*i. e.*, of Minnesota] a majority of either house was a quorum to transact business, and laws could be passed by a single member voting in the affirmative if no one voted against him."

The better-sustained holding seems to be that a measure is never adopted in a definite body unless it receive not only the favorable vote of a majority of those voting, but also of a majority of a quorum, and that in such a case it is adopted, although those present and not voting

equal or exceed in number those who vote for the measure. This is on the theory that the members present who do not vote, acquiesce in the action of the majority of a quorum.

The rule is thus laid down in *The Rushville Gas Company* vs. *The City of Rushville* (121 Ind., 206), in *Attorney-General* vs. *Shepard* (62 N. H., 383), and in many of the other cases cited above. It is not quite clear whether Judge Dillon agrees with this statement of the rule or not. Some language used by him would seem to require that when more than a bare quorum is present, a majority of all present should vote for the measure to pass it; in other words, that silence is a negative vote and not acquiescence. It is immaterial, so far as this case is concerned, which view is the true one, because the bill here received 138 votes, much more than a majority of all those shown by the Journal to have been present when the vote was taken.

It may be argued, however, that as Rule XV only required the Clerk to record the names of members present and not voting sufficient to make a quorum, more than 138 members might have been present and not voting, and thus that the bill does not affirmatively appear from the Journal to have received the favorable vote of a majority of all the members present. If the burden were on the United States to establish that the act passed, the consideration suggested might require us to maintain that where a majority of a bare quorum vote in favor of a bill, though an equal or greater number are present and remain silent, the bill is passed, as held in the cases of *The Rushville Gas Co.* vs. *The City of Rushville*, and *Attorney-*

General vs. *Shepard*, *supra*. But we are here discussing the validity of a duly signed, enrolled, and printed act. The burden is on him who impeaches it. Every favorable presumption to sustain the act will be indulged by the court. (*Attorney-General* vs. *Rice*, 64 Mich., 385; *Wise* vs. *Biggar*, 79 Va., 269; *Supervisors* vs. *People*, 25 Ill., 181; *State* vs. *Francis*, 26 Kans., 724; *In re Vandeberg*, 28 Kans., 243; *State* vs. *Hastings*, 24 Minn., 78; *State* vs. *Mead*, 71 Mo., 266; *State* vs. *Algood*, 87 Tenn., 163.)

If it is necessary to sustain the act, the journals showing nothing to the contrary, it will be presumed that the 138 votes recorded in favor of the bill being a majority of those appearing on the journal to be present, was a majority of all members actually present. The question suggested above, as to the power of a majority of a bare quorum to pass a bill in the silence of a greater number present, does not, therefore, arise. The bill was validly passed by the House of Representatives, and as no question is made in respect to the regularity with which it was passed by the Senate, and approved by the President, it became on May 9, 1890, the law of the land.

B.

CONCERNING THE EFFECT OF THE ACT.

I.

We now come to the interpretation and effect of the act. It reads as follows:

> That the Secretary of the Treasury be, and he hereby is, authorized and directed to classify as woolen

cloths all imports of worsted cloths, whether known under the name of worsted cloth or under the name of worsteds, diagonals, or otherwise.

The words "to classify imports" have a well-understood, and we might almost say a technical, meaning with reference to the customs law. To classify an import is to construe the tariff law and determine under what clause the import in question is to be assessed for duty. As examples of this use of the term, see the silk act of February 8, 1875 (18 Stat., 307), clause 2, paragraph 365, tariff index, tariff of March 3, 1883; the opinion of Mr. Justice Brown, in *American Net and Twine Company* vs. *Worthington*, decided at the present term; and *Robertson* vs. *Salomon* (130 U. S., 412, 414, 415). To classify an article as a woolen cloth is therefore "to so construe the tariff act that the article shall be treated as a woolen cloth and assessed for duty under the clause fixing the duty thereon." Thus understood, the act authorizes and directs the Secretary of the Treasury to so construe the then existing tariff act, *i. e.*, the act of March 3, 1883, as that the term woolen cloths in the tariff act shall include worsted cloths.

We have quoted in the statement of the case two clauses in the woolen schedule of the act of 1883, one of which assessed a particular rate of duty on "woolen cloths, woolen shawls and all manufactures of wool of every description," and the other of which assessed a lower duty on "flannels, blankets, hats of wool, knit goods and all goods made on knitting frames, balmorals, woolen and worsted yarns, and all manufactures of every description, composed wholly or in part of worsted, the hair of

the alpaca, goat, or other animals (except such as are composed in part of wool) not specially enumerated or provided in the act."

The evidence in the record (p. 18) shows that worsted is made of wool and that the difference between what are technically known as worsted and woolen fabrics is that the wool is combed in its preparation for the former, and carded for the latter. It is obvious, therefore, that in a wider sense a worsted cloth is a woolen cloth. The genus is woolen cloth; the species is worsted cloth. It is also obvious that a worsted cloth is a manufacture of worsted. Taking either clause alone, therefore, its language must be construed to include worsted cloths. As they were both in the act, however, it became a question of construction to determine which should be held to apply to worsted cloths.

The act of May 9, 1890, directed the Secretary of the Treasury to construe the clauses so that worsted cloths should be included or classified as woolen cloths under the first clause, and therefore not as manufactures of worsted under the second clause. The importers contend that Congress has no power to provide for such a construction because it is contrary to the facts, and the act of 1883. The point is made in Judge Lacombe's opinion in this wise:

> This act proceeds on an entirely novel theory. It provides expressly for a classification in direct nonconformity to the facts. It authorizes an officer of the Government who may find an import to be in fact an article which under the tariff laws pays one rate of duty to call it something else which it is not in

> order to enable the revenue officers to levy upon it a rate of duty which that other article, which it is not, pays.

This is novel language for a learned judge to use in reference to an act of Congress.

It wholly ignores the power of Congress, repeatedly exercised, to amend a statute by requiring a construction of it which, judicially speaking, its language will not bear. Such a power could be exercised even to the extent of requiring the Secretary to construe "woolen cloths" to include brass buttons if need be. While this would be a very awkward and absurd way of effecting an amendment requiring brass buttons to pay the same duty as woolen cloths, there is no constitutional reason why the intention of Congress thus expressed may not be enforced in a subsequent execution of the law.

But the statement of the learned judge not only ignores the frequent exercise of the power of legislative construction, but is clearly incorrect in its statement of the facts. Worsted cloth is woolen cloth because it is cloth made of wool. Under the tariff act of 1883 unamended, and in trade designation, as interpreted by the courts, woolen cloth is given a narrow meaning, and is distinguished from worsted cloth. The words of the act of May 9th, 1890, "whether known under the name of worsted cloth, or under the name of worsteds, diagonals, or otherwise," evidently refer to the rule of construction adopted by this and other courts, that in a customs law, words which have acquired a peculiar or limited trade and commercial meaning, are to be so construed. The act is a direction to the Secretary to disregard this rule of construction and to give to the

term "woolen cloths," as used in the tariff act of 1883, its generic sense, *i. e.*, cloths made of wool, in so far, at least, as to include in it worsted cloths, rather than its technical or trade meaning. The construction enjoined is not "in direct nonconformity to the facts," nor is the act an injunction to an officer to call one thing "something else which it is not, in order to enable the revenue officers to levy upon it a rate of duty which that other article which it is not, pays," as the learned circuit judge expressed it. The construction enjoined is simply in nonconformity with the previous construction of the act of 1883 by the courts. What is the result? The act of 1883 is amended by inserting a proviso, if you please, that the Secretary shall construe thereafter woolen cloths to include worsted cloths.

We fully concede that the construction required of the Secretary is repugnant to the terms of the act of March 3, 1883, as construed by the learned circuit judge in *Ballin* vs. *Magone* (41 Fed. Rep., 921) and by this court in *Seeberger* vs. *Cahn* (135 U. S., 95). But we have not yet become aware of the sacred character of that act which will prevent its amendment. The more clearly the learned judge of the circuit court, and the counsel for the importers, show the inconsistency of the act of May 9, 1890, with the act of 1883, the clearer becomes the intention of Congress to amend the act of 1883, and the clearer becomes the duty of the court to carry out that intention. Congress certainly has power expressly or impliedly to amend or repeal any law on the statute book. Implied amendments or repeals are not favored, and are only recognized by the courts when the repugnance of the new provision to that

of the old act is such that the two can not be reconciled. We are indebted to our opponents here, and the learned circuit judge, for a demonstration of the repugnance necessary to give the act of May 9, 1890, the effect of an implied amendment of the act of 1883.

Implied amendments, by requiring a construction of law not warranted by its language, are by no means so novel as the learned circuit judge would seem to think. Frequent cases of the kind have been adjudicated in this court and the necessary effect of such legislation clearly set forth. Thus in the case of *Stockdale* vs. *Insurance Companies* (20 Wall., 323–331), Mr. Justice Miller says:

> Both in principle and authority it may be taken to be established, that a legislative body may by statute declare the construction of previous statutes so as to bind the courts in reference to all transactions occurring after the passage of the law, and may in many cases thus furnish the rule to govern the courts in transactions which are past, provided no constitutional right of the party concerned is violated.

See also *Koshkonong* vs. *Burton* (104 U. S., 668).

II.

The act of May 9, 1890, directed the Secretary of the Treasury to construe the term "woolen cloths," in the tariff act of 1883, to include worsted cloths. The question arises what effect the instruction to the Secretary should have. Is the application of the act to be limited to such imports of worsteds as are personally classified by the Secretary, or is the act to be so construed as to

make it equivalent to a provision that such imports of worsted cloths shall generally be so classified. The reasons for the latter construction are so overwhelming that but for the decision of the circuit court, we should feel that we were taking up the time of this court unnecessarily in presenting them.

When the act was passed, the Secretary of the Treasury was the ultimate administrative authority for the classification of merchandise imported into this country. By section 2931 of the Revised Statutes the decision of the collector of customs as to the rate and amount of duties to be paid on merchandise imported was made final and conclusive unless protested against within ten days of the ascertainment and liquidation of the duties. On protest, and within thirty days from the liquidation, the importer might appeal to the Secretary of the Treasury.

The decision of the Secretary on such appeal, that is, as to the rate and amount of the duties, was made final and conclusive unless suit was brought within ninety days against the collector to recover the duties claimed to have been illegally exacted. Here was a provision by which the collector first classified the goods, and the Secretary of the Treasury approved or disapproved his classification thereof. The collector is the subordinate of the Secretary of the Treasury.

Section 248, Revised Statutes, provides that the Secretary of the Treasury shall superintend the collection of the revenue. Section 249 provides that the Secretary of the Treasury shall direct the superintendence of the collection of the duties on imports and tonnage. Section

251 provides that he shall make and issue from time to time instructions and regulations to the several collectors, etc., and shall prescribe rules and regulations not inconsistent with law in carrying out the provisions of the law relating to the raising of revenue from imports, or to the duties on imports, and that he shall give such directions to collectors.

Section 2652 provides that it shall be the duty of all officers of the customs to execute and carry into effect all instructions of the Secretary of the Treasury relative to the execution of the revenue laws, and in case any difficulty shall arise as to the true construction or meaning of any part of the revenue laws, the decision of the Secretary of the Treasury shall be conclusive and binding upon all officers of the customs.

A construction of a law which is imposed on the head of the Department is of course binding on all his subordinates, especially where it is made his duty to instruct his subordinates as to what the proper construction shall be.

The act is therefore an instruction to every collector and subordinate of the Secretary of the Treasury engaged in enforcing the tariff laws to make the same classification.

Where the executive is commanded by Congress to construe and execute the laws in a certain way, if no constitutional inhibition prevents, all law-abiding courts will regard that as being thereafter the necessary effect of the law.

The Secretary of the Treasury was mentioned in the act because he was the executive head of the department

in which classification of imports takes place. When he is enjoined by law to make a certain classification under the tariff laws, it becomes the law affecting every officer, court, and importer under the legislative control of the Congress of the United States.

If any action by the Secretary were necessary to give operation to the law (which we deny) it exists in this case. Immediately after the passage of the act the Secretary of the Treasury issued the following circular (S. D. 10020, Treasury Decisions, 1890):

> TREASURY DEPARTMENT, *May* 13, 1890.
>
> *To collectors and other officers of the customs:*
>
> The following act of Congress, approved May 9th, 1890, is herewith published for the information and guidance of all concerned:
>
> "AN ACT providing for the classification of worsted cloths as woolens.
>
> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Treasury be, and he hereby is, authorized and directed to classify as woolen cloths all imports of worsted cloths, whether known under the name of worsted cloth or under the names of worsteds, diagonals, or otherwise."
>
> GEORGE C. TICHENOR,
> *Assistant Secretary.*

Of this, of course, the courts take judicial notice. If action by the Secretary were required, it is here. This is a direction by him to all his subordinates thereafter to classify worsted cloths as woolen cloths.

It follows that the act of May 9, 1890, is to be construed as if it read "hereafter the act of March 3, 1883,

is to be so construed that the term woolen cloths shall be held to include worsted cloths for purposes of classification for duty."

The learned circuit judge however held otherwise. He held that the necessary effect of the words of Congress was to limit the construction therein required of the Secretary to such importations as he personally classified. We quote his language:

> Now, this is a very extraordinary species of legislation, and there is no reason why we should be surprised to find that Congress has confided the exercise of those peculiar functions to a very high officer of the Government. When Congress has expressly confined that exercise, as it has by the language of this act, to the Secretary of the Treasury, I do not think that the courts are warranted in finding that power in any other officer. I do not mean by that to suggest for one moment that under the phraseology of this act it is the duty of the Secretary of the Treasury to himself examine the packages of goods, to handle or see their contents; but having been informed and advised as to the facts in the same way in which he is informed and advised upon any facts upon which he is required to pass, by the examination and report of such trustworthy subordinates as he may select, the final classification of the particular articles is one to be made by him. The return here distinctly finds as a fact that he reached no such conclusion, nor undertook to do so, in the case of the importations here involved. For that reason, I think that his action can not be sustained. The decision of the board of general appraisers, therefore, in this case is reversed.

The learned judge does not note the Treasury circular just referred to. Evidence, however, was produced to

show that the Secretary of the Treasury had not gone to the appraiser's stores and opened boxes and made a physical examination of the imports in question (Record, pp. 16 and 17).

If the legislation which the learned circuit judge was considering was extraordinary, we have no hesitation in saying that the opinion which it evoked from him was equally extraordinary. That he should have been blind to the absurdities to which his construction of the law inevitably leads, not to mention the violations of the Constitution which must result therefrom, is certainly surprising.

Can it for a moment be supposed that Congress by this act intended the collector to classify worsted cloths as manufactures of worsted under the act of March 3, 1883, and that the Secretary of the Treasury should thereupon reverse his decision under the act of May 9, 1890? Could absurdity rise higher than this? The collector makes a decision required by law, and the Secretary makes another exactly reversing the collector, equally required by law. One law is to apply to goods imported when examined by the collector, and another when they are examined by the Secretary.

If it happen that the collector only acts with reference to imports, then the act of March 3, 1883, is in force unamended. If the Secretary acts it is to be under the act of May 9, 1890, amending the act of 1883. In the first case the goods are to pay a lawful duty of 18 cents per pound; in the second the same goods are to pay a lawful duty of 35 cents per pound.

Section 8, article 1, of the Constitution provides that all duties shall be uniform throughout the United States.

Can a duty be said to be uniform which varies from 18 to 35 cents as the same imported article chances to be classified by a collector of customs or the Secretary of the Treasury?

Can Congress make the imposition of different rates of duty upon the same article vary as the Secretary may or may not see fit to classify it? Is this not a delegation of arbitrary legislative power to the Secretary greater than even Congress itself may exercise? We can see but one answer to these questions.

If the construction of the learned circuit judge results in absurdities and makes the law unconstitutional, it is the duty of this court, with a desire which animates all law-abiding courts, to give effect to the Congressional will if possible, by ascribing to the language of the act a meaning which it was within the power of Congress to enforce and which will not lead to absurd results.

It follows that the effect of the act of May 9, 1890, was to impose upon worsted cloths made of wool valued at less than 80 cents a pound, 35 cents per pound and 35 per cent ad valorem, and that the action of the collector was correct.

III.

We have reached this result without any reference to the conditions existing at the time the law was passed and the exigencies demanding its enactment. They call for notice to enforce the correctness of our conclusion.

The tariff act of 1883 imposed duties on manufactures of wool which were composed of two elements. There

were what were called the compensatory duties and the protective duties. The compensatory duty was made equivalent to that imposed on the raw wool material, so that the domestic manufacturer would stand on an equality with his foreign competitor in the markets of this country in reference to the cost of his raw material. The protective duty was an *ad valorem* duty imposed for the purposes of protecting and encouraging the manufacture of the finished product. Thus, on woolen cloths and manufactures of wool the compensatory duty was 35 cents a pound, and the protective duty was 35 per centum ad valorem. Under the worsted clause the compensatory duty was from 10 to 24 cents per pound on material worth less than 80 cents and 35 per cent ad valorem.

When the act of 1883 was passed the wool of the worsted cloths like those in suit was worth more by the pound than 80 cents, and under the worsted clause paid a compensatory duty of 35 cents a pound, or the same as that of woolen cloths. The only worsted manufactures worth less than 80 cents a pound were made of cheaper and coarser wools. By improvements in combing machinery, however, very fine worsted cloths came in at less than 80 cents a pound, and if dutiable as manufactures of worsted paid only from 14 to 24 cents a pound.

The domestic manufacturer was obliged, in manufacturing worsted cloths, to use the raw material which paid a duty of 35 cents. The result was that the worsted importers did not pay a compensatory duty that compensated for the increased cost of the raw material to the domestic worsted manufacturers by one-half, and the lat-

ter were being driven out of business. The condition was described by Mr. Fairchild, Secretary of the Treasury, in his Annual Report to Congress in 1887 as follows (Annual Report of Secretary Fairchild, 1887):

> A conspicuous example of the inequalities of the tariff is found in the discrimination in the rates of duty imposed upon woolen and worsted cloths.
>
> Improvement in recent years in the machinery employed in combing wool has so changed the character of what are known as worsted cloths that the latter have largely superseded woolen cloths for use as men's wearing apparel. This change in the style of manufacture and use of worsted cloths has operated to the serious injury of our domestic manufacturers of these goods, because the duty on the wool which they must use is the same as that upon wool used in making woolen cloths, while the rates of duty imposed upon the latter when valued at not exceeding 80 cents per pound are 35 cents per pound and 35 per cent ad valorem, whereas the duty on worsted cloths valued at not exceeding 80 cents ranges from 10 to 24 cents per pound and 35 per cent ad valorem. In some cases the duty on the wool used in making worsted cloths exceeds the duty imposed on the finished article.
>
> Earnest representations have been made to me of the hardships suffered by domestic interests on account of these changed conditions. There is much reason to believe that the manufacture of worsted cloths must soon cease in this country unless the tariff law in this regard is amended.

Because of this suggestion, the tariff bill which was introduced in 1888, known as the Mills bill, contained a clause of exactly the same tenor and effect as the act of

May 9, 1890, except that it was to continue in force only from the date of the passage of the bill until the time fixed in that bill for the beginning of the new system thereby to be inaugurated.

In May, 1889, Secretary Windom decided on appeal that worsted cloths like those here in question were dutiable as woolen cloths under the act of 1883, and not as manufactures of worsted, and ordered them to be classified accordingly. The importers at once brought suit to test the correctness of the Secretary's classification, and in April, 1890, Judge Lacombe held, in the case of *Ballin* vs. *Magone* (41 Fed. Rep., 921), that it was erroneous, and that worsted cloths should be classified as manufactures of worsted.

It was then understood that, in view of Judge Lacombe's decision and the probability that it would be affirmed by this court, and in anticipation of an entirely new tariff bill, importers were about to hurry into the country large quantities of worsted cloths upon which duties would be collected in accordance with the Secretary's classification at the woolen rate, and that then suits would be brought to recover the excess over the worsted rate. These were the conditions and exigencies which led to the introduction of the bill which afterwards became the act of May 9, 1890. It was intended thereby to prevent any further doubt as to the rate which worsted cloths should pay and to prevent a refund of duties on any future importations of worsted cloths.

The purpose of the bill was to make the classification by the Secretary of the Treasury, which the circuit court had rejected as erroneous, legal as to all future importa-

tions. This doubtless explains the framing of the act by which the Secretary is authorized and directed to classify as therein directed. We have given in the Appendix (p. IV) the report of the Committee of Ways and Means on the bill, and a perusal of that will show the correctness of the foregoing statement of the conditions leading to the passage of the bill. A reference to the debates on the bill in Congress will show the same thing. (See pages 3983–3989, and 3992–3999, Cong. Record., Vol. 21, Part 4, Fifty-first Congress, first session, and pages 4288–4300, Vol. 21, Part 5.) That such sources may be properly consulted for the purpose of using the surrounding circumstances to aid in the construction of an act is established by the decision of this court in *American Net and Twine Co.* vs. *Worthington*, a case involving the duty on gilling twine used for fishing nets, and decided at the present term of this court. Mr. Justice Brown, speaking for the court, said:

> While the statements made and the opinions advanced by the promoters of the act in the legislative body are inadmissible as bearing upon its construction, yet reference to the proceedings of such body may properly be made to inform the court of the exigencies of the fishing interests and the reason for fixing the duty at this amount. *Jennison* vs. *Kirk* (98 U. S., 453, 459); *Blake* vs. *National Banks* (23 Wall., 307, 317); *Collector* vs. *Richards* (23 Wall., 246, 258); *Gilmer* vs. *Stone* (120 U. S., 586, 590); *United States* vs. *Union Pacific R. R. Co.* (91 U. S., 72, 79.)

The inequality which the act of May 9, 1890, was passed to remedy can not be more forcibly shown than it is in the speech of Mr. Carlisle, of Kentucky, in the debate on

the bill (Congressional Record, Vol. 21, Part 4, p. 3987, Fifty-first Congress, first session), and we have, therefore, incorporated it in the Appendix to this brief, p. XXI.

The debate on the bill was sharp and vigorous. Nowhere from the beginning to the end of it in the speeches *pro* or *con*, does there appear the slightest disagreement as to what the bill was intended to effect. It was a proposition conceded by the promoters, and accepted by the opponents of the measure, that, if it passed, the construction of the courts would have to yield to the construction of the Secretary. It was not conceded by the Republicans that the Secretary's previous construction of the act of 1883 was wrong, but it was intended to make that construction absolutely right thereafter.

That the act would make the duty on worsted cloths the same as that upon woolen cloth, was so plain to all sides as not to invite the slightest controversy. No one, be he judge, lawyer, or layman, can read the committee's report and the debate without being convinced that this was the intention of Congress. We have shown that the language used carries out that intent. We confess ourselves at a loss to understand what tenable ground can be advanced for any other conclusion.

We have been informed that some point is to be made as to the effect of the bill, by reference to the fact that certain amendments were held by the chairman of the Committee of the Whole not to be germane to the bill under clause 7 of Rule 16, which provided that—

> No motion or proposition on a subject different from that under consideration shall be admitted under color of amendment.

The chairman held that amendments fixing different rates of duty upon wool were not germane to the act which classified worsted cloths for the same duty as woolen cloths. (See pp. 3997 and 3998, Vol. 21, part 4, Congressional Record, Fifty-first Congress, first session.) Whether that decision was correct or not has not the slightest bearing upon the effect which the bill was intended by Congress to have. An examination of the debate shows the intention so conclusively that it can not but be the source of surprise to have a contention of this sort raised with respect to the meaning of the bill.

It is respectfully submitted to the court that the judgment of the circuit court should be reversed, and that the action of the board of general appraisers and the collector should be affirmed.

WM. H. TAFT,
Solicitor-General.

APPENDIX.

EXHIBIT A.

[Extract from Journal of the House of Representatives, first session Fifty-first Congress, pages 549 and 550. Proceedings of April 30, 1890.]

WEDNESDAY, *April* 30, 1890.

* * * * *

The Speaker laid before the House the bill of the House (H. R. 9548) providing for the classification of worsted cloths as woolens, coming over from last night as unfinished business, with the previous question and the yeas and nays ordered.

The House having proceeded to the consideration,

And the question being put,

Shall the bill pass?

There appeared, { Yeas 138
Nays 0
Not voting 189

The yeas and nays being desired by one-fifth of the members present,

Those who voted in the affirmative are—

Adams,	Brewer,	Connell,	Funston,
Allen, Mich.	Brosius,	Craig,	Gear,
Anderson, Kans.	Browne, Va.	Culbertsen, Pa.	Gest,
Andrew,	Buchanan, N. J.	Cutcheon,	Greenhalge,
Arnold,	Burrows,	Darlington,	Grosvenor,
Atkinson, Pa.	Burton,	De Lano,	Hansbrough,
Atkinson, W. Va.	Butterworth,	Dingley,	Harmer,
Baker,	Caldwell,	Dolliver,	Haugen,
Bartine,	Cannon,	Dunnell,	Henderson, Ill.
Bayne,	Carlisle,	Evans,	Henderson, Iowa
Beckwith,	Carter,	Ewart,	Hermann,
Belden,	Cheadle,	Farquhar,	Hill,
Belknap,	Clancy,	Flick,	Hitt,
Bliss,	Cogswell,	Flood,	Hopkins,
Boothman,	Comstock,	Flower,	Houk,
Boutelle,	Conger,	Frank,	Kelley,

Kennedy,
Kerr, Iowa
Ketcham,
Kinsey,
La Follette,
Laidlaw,
Lansing,
Laws,
Lehlbach,
Lind,
Lodge,
Mason,
McAdoo,
McCowan,
McCord,
McKinley,
Miles,
Moore, N. H.
Morey,
Morrill,
Morrow,
Morse,
Mutchler,
Niedringhaus,
Nute,
O'Donnell,
O'Neil, Mass.
O'Neill, Pa.
Osbottne,
Owen, Ind.
Payne,
Peters,
Pickler,
Post,
Pugsley,
Quackenbush,
Raines,
Randall,
Ray,
Reed, Iowa
Reilly,
Reyburn,
Rowell,
Russell,
Sanford,
Sawyer,
Scranton,
Scull,
Sherman,
Simonds,
Smith, W. Va.
Smyser,
Snider,
Spooner,
Stephenson,
Stewart, Vt.
Stivers,
Stockbridge,
Taylor, E. B.
Taylor, Ill.
Taylor, J. D.
Taylor, Tenn.
Thomas,
Townsend, Colo.
Tracey,
Turner, Kans.
Vandever,
Wade,
Walker, Mass.
Wallace, Mass.
Wallace, N. Y.
Williams, Ohio
Wilson, Ky.
Yardley.

Those who voted in the negative are—none.

Those not voting are—

Abbott,
Alderson,
Allen, Miss.
Anderson, Miss.
Barkhead,
Banks,
Barnes,
Barwig,
Bergen,
Biggs,
Bingham,
Blanchard,
Bland,
Blount,
Boatner,
Bowden,
Breckinridge, Ark.
Breckinridge, Ky.
Brickner,
Brookshire,
Brower,
Brown, J. B.
Browne, T. M.
Brunner,
Buchanan, Va.
Buckalew,
Bullock,
Bunn,
Bynum,
Campbell,
Candler, Ga.
Candler, Mass.
Carlton,
Caruth,
Caswell,
Catchings,
Cheatham,
Chipman,
Clark, Wis.
Clarke, Ala.
Clements,
Clunie,
Cobb,
Coleman,
Conger, Ind.
Cooper, Ohio
Cothran,
Covert,
Cowles,
Crain,
Crisp,
Culberson, Tex.
Cummings,
Dalzell,
Dargan,
Davidson,
De Haven,
Dibble,
Dockery,
Dorsey,
Dunphy,
Edmunds,
Elliott,
Ellis,
Enloe,
Featherston,
Finley,
Fitch,
Fithian,
Forman,
Forney,
Fowler,
Geissenhainer,
Gibson,
Gifford,
Goodnight,
Grimes,
Grout,
Hall,
Hare,
Hatch,
Hayes,
Haynes,
Heard,
Hemphill,
Henderson, N. C.
Herbert,
Holman,
Hooker,
Kerr, Pa.
Kilgore,
Knapp,
Lacey,
Lane,
Lanham,
Lawler,
Lee,
Lester, Ga.
Lester, Va.
Lewis,
Magner,
Maish,
Mansur,
Martin, Ind.
Martin, Tex.
McCarthy,
McClammy,
McClellan,
McCormick,
McCreary,
McKenna,
McMillin,
McRae,
Milliken,
Mills,
Moffit,
Montgomery,
Moore, Tex.
Morgan,
Mudd,
Norton,
Oates,
O'Ferrall,
O'Neall, Ind.
Outhwaite,
Owens, Ohio
Parrett,
Paynter,
Payson,
Peel,
Pennington,
Perkins,
Perry,
Phelan,
Pierce,
Price,
Quinn,
Richardson,
Rife,
Robertson,
Rockwell,
Rogers,
Rowland,
Rusk,
Sayers,
Seney,
Shively,
Skinner,
Smith, Ill.
Spinola,
Springer,
Stahlnecker,
Stewart, Ga.
Stewart, Tex.
Stockdale,
Stone, Ky.

Stone, Mo.	Turner, Ga.	Watson,	Wilkinson.
Struble,	Turner, N. Y.	Wheeler, Ala.	Willcox,
Stump.	Turpin.	Wheeler, Mich.	Williams, Ill.
Sweney,	Van Schaick,	Whiting.	Wilson, Mo.
Tarsney.	Venable.	Whitthorne,	Wilson, Wash.
Thompson,	Waddill.	Wickham,	Wilson, W. Va.
Tillman.	Walker, Mo.	Wike,	Wright,
Townsend, Pa.	Washington.	Wiley,	Yoder.
Tucker.			

The said roll call having been recapitulated,

The Speaker announced from a list noted and furnished by the Clerk, at the suggestion of the Speaker, the following-named members as present in the Hall when their names were called and not voting, viz:

Messrs. Allen of Mississippi, Anderson of Mississippi, Bankhead, Barwig, Biggs, Blanchard, Blount, Breckinridge of Kentucky, Brookshire, Buchanan of Virginia, Bullock, Bynum, Campbell, Caruth, Catchings, Chipman, Clarke of Alabama, Clunie, Cobb, Cothran, Crain, Crisp, Culberson of Texas, Cummings, Davidson, Dockery, Dunphy, Edmunds, Fitch, Fithian, Forney, Fowler, Geissenhainer, Goodnight, Hatch, Hayes, Haynes, Heard, Hemphill, Henderson of North Carolina, Holman, Hooker, Kilgore, Lanham, Lee, Lester of Georgia, Martin of Indiana, Martin of Texas, McClellan, McCreary, McMillin, McRae, Montgomery, Moore of Texas, Norton, O'Neil of Massachusetts, Outhwaite, Owens of Ohio, Perkins, Pierce, Prince, Richardson, Rogers, Sayers, Skinner, Spinola, Stewart of Georgia, Stockdale, Tarsney, Turner of Georgia, Walker of Missouri, Wike, Williams of Illinois, and Wilson of West Virginia.

The Speaker thereupon stated that the said members present and refusing to vote (74 in number), together with those recorded as voting (138 in number), showed a total of 212 members present, constituting a quorum present to do business, and that the yeas being 138 and the nays none, the said bill was passed.

Ordered, That the Clerk request the concurrence of the Senate in said bill.

EXHIBIT B.

[Report of Committee on Ways and Means on introducing the bill.]

House of Representatives, Fifty-first Congress; first session; Report No. 1664.

CLASSIFICATION OF WORSTED CLOTHS AS WOOLENS.

[APRIL 22, 1890.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.]

Mr. Dingley, from the Committee on Ways and Means, submitted the following report (to accompany H. R. 9548):

The Committee on Ways and Means, to whom was referred the bill (H. R. 9548) providing for the classification of worsted cloths as woolens, report the same back with a favorable recommendation.

This bill is made necessary in order to prevent a grave injustice being done to manufacturers of worsted cloths in the United States and to the Treasury by the classification of these goods under a paragraph of the present tariff law which imposes upon them a much lower and inadequate compensatory duty than is given woolen cloths, when as a matter of fact worsted cloths are not only made of clothing wool, but also as now made, take the place of fabrics known as woolen cloths.

Under the tariff act of 1883 woolen cloth was given a specific duty of 35 cents per pound to compensate the American manufacturer for the duties on wool. Another paragraph of the same act provided a lower compensatory duty of from 10 to 24 cents per pound on flannels, blankets, and manufactures of worsted valued less than 80 cents per pound, and 35 cents per pound on all such goods valued over 80 cents. These lower compensatory duties were intended for coarse, cheap, unfinished goods, not

composed entirely of wool, like flannels, blankets, and stuff goods, and were not intended for any finished goods like cloths for men's wear. Inasmuch as worsted cloths at that time were all, or nearly all, valued at more than 80 cents per pound, and would be subject to 35 cents per pound, specific duty, the attention of manufacturers was not attracted to the danger lurking in the words "manufactures of worsted." It is clear that Congress intended to impose the uniform specific pound duty of 35 cents on all cloth made of wool; as worsted cloth is made of the same wool, costs substantially the same, and is used for the same purposes as woolen cloth. But immediately after the passage of the act of 1883, imports of worsted cloth under the pound duties, intended for flannels and blankets, began to come in; not, however, without continued protest from domestic manufacturers.

Thus for several years our tariff as administered presented the anomaly of giving the manufacturer a duty of 35 cents per pound on cloth made of carded wool as a compensation for the wool duty, while it gave to the manufacturer of worsteds valued less than 80 cents per pound a compensatory duty of only 10 to 24 cents, or on the average only half the wool duty, which was a manifest discrimination against our worsted manufacturers that began to seriously injure our own woolen manufacturing industry by giving foreign manufacturers a great advantage. So serious had this discrimination become that Secretary Fairchild called the attention of Congress to the necessity of legislation to correct it. A bill identical with the bill reported by your committee was presented to the House and referred to the Committee on Ways and Means at the first session of the Fiftieth Congress, and the provisions of that bill were included in the tariff bill reported at that session.

Subsequently the worsted manufacturers of the country presented their grievances to Secretary Windom and

pointed out that it was the intention of Congress to give a specific duty of 35 cents per pound as compensatory for the duty on wool to the wool manufacturer, and in view of the arguments made the Secretary made a ruling May 23, 1889, classifying worsted cloths as woolen cloths. Since that time worsted cloths have been so classified. The importers, however, appealed to the courts, and a jury, under the instructions of the presiding judge of the United States district court for the southern district of New York, has found against the Government. The Secretary of the Treasury will carry the case to the United States Supreme Court, and until his order classifying worsteds as woolens shall be reversed by the court of last resort the same duties will be collected on both classes of goods.

In this situation the importers, believing that they will ultimately prevail, are preparing to increase their orders for foreign worsteds and bring them in before any general tariff legislation can be framed and take effect, in the expectation that they will be able ultimately to obtain a refund of all specific duties imposed upon them in excess of 10 to 24 cents per pound. Therefore, unless there shall be prompt legislation to correct the injustice done the worsted manufacturers, not only will they suffer by excessive importations, but the Treasury may be called upon to refund many millions of dollars collected as duties on imported worsteds, all of which will go to increase the profits of the importers who will first take care to collect of their customers the duties paid.

The question presented by this bill is one which does not affect the points in dispute between political parties in regard to tariff legislation, for whatever duties may be imposed on imports of manufactures of wool, goods known as worsted cloths and the goods known as woolen cloths, both manufactured of wool and both used for the same purpose, should be subject to the same duties, and espe-

cially should this be the case with the specific duties which are simply the equivalents of the duties imposed by the law upon the wool of which they are made.

Your committee, therefore, believe that justice, as well as a due regard for the interests of the Treasury, require the passage of the accompanying bill.

EXHIBIT C.

[Opinion of Judge Somerville, general appraiser. 10336.—G. A. 57.]

Constitutionality of the act of May 9, 1890.

NEW YORK, *October* 13, 1890.

SIR: We are in receipt of your letter of the 13th ultimo, transmitting the protests described in the accompanying schedule against the assessment of duty, at the rate of 35 per cent ad valorem and 35 cents per pound, on certain so-called "worsteds," imported in the vessels named.

The merchandise was returned by the appraiser as "woolen cloths under 80 cents per pound," and duty was accordingly assessed thereon at the rates above stated, under the provisions of T. I., 362.

It is claimed by the importer that the goods are manufactures composed wholly or in part of worsted, and not composed in part of wool, and should be classified accordingly under Schedule K, act of March 3, 1883.

The correctness of this contention turns on the constitutional validity of the act approved May 9, 1890, entitled "An act providing for the classification of worsted cloths as woolens." This act reads as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Treasury be, and he is hereby, authorized and directed to classify as woolen

cloths all imports of worsted cloth, whether known under the name of worsted cloth or under the name of worsteds or diagonals or otherwise."

In form this act purports to authorize and direct the Secretary of the Treasury to classify all imported *worsted* cloths as *woolen* cloths. It was never intended, as seems to be supposed, that this officer should engage in the duties of an appraiser of merchandise, by himself inspecting every invoice of such goods at every port in this country, passing judgment upon them, and formally announcing his judgment. This would be both absurd and impracticable. The law itself operates *ipso facto* to place worsted cloths in the same category with woolen cloths as to classification and rates of duty. In any event the circular issued by the Secretary of the Treasury on May 13, 1890, referring to the law in question, as contained in Treasury Decisions No. 10020, would have this effect if any official action on the part of this officer were needed to execute its manifest purpose.

The importer, however, assails this law as unconstitutional, chiefly on the following grounds:

1. That a quorum of the House of Representatives was not present when the vote was taken on the bill.

2. That a quorum of the House did not vote on the bill.

3. That the act was declared by the Speaker of the House to have been passed, and was certified to have been passed, when it had not been constitutionally enacted, which was in violation of section 5 of article 1 of the Constitution of the United States.

These objections fairly present the question sought to be raised, and the power vested by Congress in this Board, under the provisions of section 14 of the act of June 10, 1890, authorizing the creation of the Board of General Appraisers for the port of New York, confers on us the jurisdiction and also imposes the duty "to examine and

decide the case thus submitted." The power to decide is a judicial power, and involves the authority to hear and determine by due process of law.

In view of the importance of the issue involved, and of the large number of cases before us depending on its decision, we deem it proper to give the reasons upon which the conclusion reached by us is founded, and to cite the authorities which, in our judgment, support this conclusion.

Taking judicial notice of the proceedings of the House of Representatives (as found in the *Congressional Record*, May 1, 1890, page 4188) we find that the proceedings of that body disclose the following facts in taking the vote on that bill under consideration:

"Yeas, 138; nays, 0; not voting, 189.

"The SPEAKER. The Clerk will announce the names of members present and not voting. The Clerk read. (Here follows 75 names.)

"The SPEAKER: The names of the members not voting, 75 in number, together with 138 voting in the affirmative, being 213 in all, more than a quorum necessary under the Constitution to transact business, the Chair makes the following announcement of the vote: The yeas are 138, nays none, and the bill is passed."

This journal of legislative proceedings is a public record, of the contents of which we are at liberty to take judicial notice without formal proof being made. (South Ottawa *vs.* Perkins, 94 U. S., 260; Cooley on Const. Lim., 163.)

The question before us in one purely of constitutional law, and must be decided from this high standpoint, entirely free from any prejudice liable to be engendered by political considerations.

The Constitution of the United States (article 1, section 5) provides that "a majority of each House shall constitute a quorum to do business;" but that a smaller num-

ber may adjourn from day to day, and may be "authorized to compel the attendance of absent members," under proper penalties. It is further declared that "each House may determine the rules of its proceedings," and that "each House shall keep a journal of its proceedings," and "the yeas and nays of the members of either House, on any question, shall, at the desire of one-fifth of those present, be entered in the journal."

The journal of the House proceedings unquestionably shows a majority of all the members to be present, and a majority undoubtedly constitutes a quorum to do business. The inquiry then is reduced to this: Can the House authorize its journals to be so prepared as to show a quorum to be present, although many of those included to make up the quorum were silent when the vote was taken by "ayes" and "nays" and refused themselves to record their votes? In our judgment this authority seems to follow by implication from the three powers expressly enumerated in section 5, article 1, above cited:

1. The power of the House to keep a journal of its own proceedings, which carries with it the power to make such journal speak the truth.

2. The power to compel the attendance of absent members, which also implies the authority to utilize their attendance after their corporal presence is enforced. It could not be intended that any member should be compelled to vote irrespective of any parliamentary rule on this subject.

3. The power of the House to make its own rules of parliamentary proceeding. This would seem to embrace the authority to adopt any mode of ascertaining the presence of a quorum in the House within the discretion of that body not expressly or impliedly prohibited by the Constitution.

It is true that the House formerly had a rule of procedure which provided that when the roll call disclosed the absence of a quorum, the Chair could not go outside

of the record to decide the presence of a quorum. (Const., Man., and Dig., 2d Sess. 46th Cong., 338.) Such, at any rate, seems to have been the practice of the Chair, although it was ordained by another rule that every member present during the call of the yeas and nays "shall vote on each question put from the Chair." The two rules are clearly repugnant, and the enforcement of either seems to be the disobedience of the other.

The old rule prevailed until the adoption by the House of Representatives of the 51st Congress of Rule XV, the third paragraph of which reads as follows:

"On the demand of any member, or at the suggestion of the Speaker, the names of members sufficient to make a quorum in the hall of the House, who do not vote, shall be noted by the Clerk and recorded in the journal, and reported to the Speaker with the names of the members voting, and be counted and announced in determining the presence of a quorum to do business."

Whether the latter was formally in force, as such, when the act of May 9, 1890, under consideration, was passed, we are not accurately advised; nor do we deem this inquiry material, as the principle of the new rule was followed by the House on the adoption of the act, as shown by the journal of its proceedings above quoted. If the constitutional power existed to adopt the new rule for all cases, the like power certainly existed to adopt it for a single case. Parliamentary rules are chiefly designed for the convenient and orderly dispatch of legislative and other business, and no one will contend that the mere violation by either House of Congress of one of its own rules of procedure, not required by the fundamental law, would authorize a court to hold void a law enacted through the instrumentality of the violation of such rule.

The settled rule of construction is that constitutions, like statutes, must be construed in the light of the principles of the common law. This rule generally was that a majority of the quorum of an assembly actually present

must control, although less than a quorum may vote. This is the undisputed law of both England and America in reference to corporations, public and private, including municipal corporations.

In *Rex* vs. *Monday* (Cowper, 538), Lord Mansfield said: "When the assembly are duly met, I take it to be clear that the corporate act may be done by the majority of those who once regularly constituted the meeting."

The following language is used in Willcock on Municipal Corporations, a very old work, and it is believed to correctly state the rule as to the election of corporate officers and the enactment of corporate ordinances:

"After an election has been properly proposed, whoever has a majority of those who vote, the assembly being sufficient, is elected, although a majority of the entire assembly altogether abstain from voting; because their presence suffices to constitute the elective body, and if they neglect to vote it is their own fault, and shall not invalidate the act of the others, but be construed an assent to the determination of the majority of those who do vote."

In the case of *Rex* vs. *Foxcraft*, 2 Burr., 1017, which involved the election of a town clerk, Lord Mansfield observed that "whenever electors are present and decline to vote at all (as they have done here) they virtually acquiesce in the election made by those who do," and so the the other judges held. This ruling was approved by Lord Denman, C. J., in *Gosling* vs. *Veley* (7 A. and E., 439), and again when the same case came before the House of Lords. The English rule has been adopted quite unanimously in this country, and is voiced in the declaration of Chancellor Kent that "a majority of the quorum may decide."

The adjudged cases fully support this view, and hold that members who are present and refuse to vote may be considered as acquiescing in the voice of the majority of those actually voting.

The authorities are lucidly reviewed in the recent case of *The Rushville Gas Company* vs. *The City of Rushville* (121 Ind., 207), decided by the supreme court of Indiana as late as the year 1889. There the common council of the town of Rushville was composed of six members. All were present when the vote was taken on the acceptance of a contract for lighting the town. Only three voted for the resolution, which was a majority of a quorum, but not a majority of those present. It was said by the court: "The rule is that if there is a quorum present, and a majority of the quorum vote in favor of a measure, it will prevail, although an equal number should refrain from voting. It is not the majority of the whole number of members present that is required; all that is required is a majority of the number of members required to constitute a quorum." And again: "The mere presence of inactive members does not impair the right of the quorum to proceed with the business of the body. If members present desire to defeat a measure they must vote against it, for inaction will not accomplish their purpose. Their silence is, in effect, a declaration that they consent that the majority of the quorum may act for the body of which they are members."

The same view is taken by the supreme court of Illinois in the case of *Launtz* vs. *The People* (113 Ill., 137), decided in 1886. The charter of the city of East St. Louis gave the mayor the right to give the casting vote in case of a tie. Four of eight councilmen present voted in the affirmative for the election of an officer. The other four being present refused to vote either way on the call of the "ayes" and "nays." It was held that the mayor could treat those present and not voting as opposed to those who had voted, and decide the question by voting also in the affirmative.

In *State* vs. *Green* (37 Ohio St., 227), it was held that members of a city council present and refusing to vote when their names were called could not defeat the elec-

tion of a clerk or divest the body of the power to elect. The legal effect of refusing to vote was, in other words, held to be an acquiescence in the choice of those who did vote, a quorum being present, although a quorum did not actually vote.

An analogous principle was applied to popular elections by the United States Supreme Court in the case of *The County of Cass* vs. *Johnson* (95 U. S., 360), where they construed a clause in the Missouri constitution. The general assembly was prohibited by this clause from authorizing any county to loan its credit to any corporation "unless two-thirds of the qualified voters" of such county at an election duly authorized assented thereto. It was held that all qualified voters who absented themselves from such election were "presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares." It was observed that "any other rule would be productive of the greatest inconvenience, and ought not to be adopted unless the legislative will to that effect is clearly expressed." The same rule was declared in *St. Joseph Township* vs. *Rogers* (16 Wall., 644).

A like doctrine has been announced by the highest judicatories of several other States, whose decisions are of great authority. In fact, we find no case opposed to this view, and it is abundantly supported by the authorities. (Angell and Ames on Corp., sec. 126, 127; Grant on Corp., 71; Horr and Bemiss on Municipal and Police Ord., 42; 1 Dillon on Municipal Corp. (4th ed.), sec. 278, 282.)

To reach the conclusion that the House of Representatives of the United States Congress, invested as it is with the express powers to "determine the rules of its proceedings," can not constitutionally change a preëxisting rule on the subject under consideration so as to declare on its journals the fact of a quorum being present, if the fact exists, we must be pointed to some clause in the Fed-

eral Constitution which curtails or limits the general power to make such rules, so as to forbid the exercise of such authority. It may be that since the foundation of the Government the House has followed another and contrary rule. This rule has been characterized as "the precedent of a hundred years." The existence of such a rule, we repeat, does not argue the constitutional disability of the same body to change or modify that rule or precedent, unless, in doing so, they violate some prohibition of the instrument from which they derive all their powers. It is not unreasonable to suppose that the framers of that instrument intended to confer the power to make a rule, which at that time was the accepted rule of parliamentary law among all English-speaking people, governing the legislative action of every municipal corporation in England and the American colonies. There would be no valid reason for conceding such a power to every petty corporation in the land and denying it at the same time to one of the legislative Houses of Congress. *A fortiori* should it be conceded to the more important body. Its purpose is to prevent the unreasonable obstruction of legislative business by the mere silence of members who are present and refuse to vote. The theory of the law is that members can not, by refusing to vote at all, accomplish more towards defeating a bill or resolution than they could by voting against it. The presence of a qualified member of the House while the legislative business is progressing must, for this reason, be construed as a participation in such business. The compulsory attendance of recusant members would be a nugatory power in the absence of the power to recognize their presence after they had been brought into the House. A refusal to vote, therefore, when present, can not lawfully operate as an abdication of membership by a member who is actually in the House. Such is deemed to be the recognized rule governing the procedure of the English Parliament. (North American Review, Sept., 1890, 372.)

Add to these considerations the proposition of law, now generally accepted by the courts, that no law ought to be declared unconstitutional unless in clear cases, where the deciding court entertains no doubt as to its unconstitutionality, and we have no alternative left but to sustain the act of May 9, 1890, under consideration.

Our opinion is that the objections to the validity of the law are not well taken, and that we can not go back behind the fact of its attestation by the President of the Senate and the Speaker of the House, and its approval by the President, all of which are regular, to ascertain whether or not in its passage the House of Representatives violated any parliamentary rule or precedent, however ancient its existence.

It follows from what we have said that the assessments of duty in the several cases above mentioned were properly made, and the decision of the collector is accordingly affirmed.

COLLECTOR OF CUSTOMS,
New York.

EXHIBIT D.

[Opinion of the circuit judge in this case (45 Fed. Rep., 170, 174).]

Lacombe, circuit judge (*orally*). There is nothing on the face of this act indicating that it is intended to repeal or in any way alter any act imposing customs duties. It is contended that in the existing state of affairs when this act was passed, in the former statutes, in the decisions of the courts, and in the debates of Congress, we may find sufficient to warrant the conclusion that it was the intention of Congress by the passage of this act to deal with the question of the duty to be laid upon goods such as

are imported here, and to change their *status* so as to lay upon them a higher rate. Conceding that for the purposes of this argument only (and it is only for the purposes of the argument that I am prepared to concede that proposition), let us see with what machinery they undertake to carry out that intent. There already existed an elaborate and well-considered scheme for appraising and classifying imported articles by means of appraisers and their subordinates, who made examinations and reports touching the component materials and values of goods, and by means of local officers (the collectors) in the respective ports where the goods came, who made their own classifications relating to them. There had been elaborated a sufficient scheme, which had been in force for many years, with the intention of securing by the machinery thus employed a faithful, just, impartial, and truthful ascertainment of the real facts of each case, and of classifying the goods according to such facts as were thus ascertained. This act, however, proceeds upon an entirely novel theory. It provides expressly for a classification in direct nonconformity to the facts. It authorizes an officer of the Government who may find an import to be in fact an article which, under the tariff laws, pays one rate of duty to call it something else, which it is not, in order to enable the revenue officers to levy upon it a rate of duty which that other article which it is not pays. Now, this is a very extraordinary species of legislation, and there is no reason why we should be surprised to find that Congress has confided the exercise of those peculiar functions to a very high officer of the Government. When Congress has expressly confined that exercise, as it has by the language of this act, to the Secretary of the Treasury, I do not think that the courts are warranted in finding that power in any other officer. I do not mean by that to suggest for one moment that under the phraseology of this act it is the duty of the Secretary of the Treasury to himself examine the packages of goods, to handle or see

their contents; but having been informed and advised as to the facts in the same way in which he is informed and advised upon any facts upon which he is required to pass, by the examination and report of such trustworthy subordinates as he may select, the final classification of the particular articles is one to be made by him. The return here distinctly finds as a fact that he reached no such conclusion, nor undertook to do so, in the case of the importations here involved. For that reason, I think that his action can not be sustained. The decision of the board of general appraisers, therefore, in this case is reversed.

EXHIBIT E.

[Debate over quorum clause of the Constitution. Madison Papers, 5 Elliott's Debates, 2nd edition, page 405.]

Article 6, section 3, was then taken up.

Mr. GORHAM contended that less than a majority in each House should be made a quorum; otherwise great delay might happen in business, and great inconvenience from the future increase of numbers.

Mr. MERCER was also for less than a majority. So great a number will put it in the power of a few, by seceding at a critical moment, to introduce convulsions and endanger the Government. Examples of secession have already happened in some of the States. He was for leaving it to the legislature to fix the quorum, as in Great Britain, where the requisite number is small, and no inconvenience has been experienced.

Col. MASON. This is a valuable and necessary part of the plan. In this extended country, embracing so great a diversity of interests, it would be dangerous to the distant parts to allow a small number of members of

the two Houses to make laws. The Central States could always take care to be on the spot; and, by meeting earlier than the distant ones, or wearying their patience and outstaying them, could carry such measures as they pleased. He admitted that inconveniences might spring from the secession of a small number; but he had also known good produced by an apprehension of it. He had known a paper emission prevented by that cause in Virginia. He thought the Constitution, as now molded, was founded on sound principles, and was disposed to put into it extensive powers. At the same time, he wished to guard against abuses as much as possible. If the legislature should be able to reduce the number at all, it might reduce it as low as it pleased, and the United States might be governed by a junta. A majority of the number which had been agreed on was so few, that he feared it would be made an objection against the plan.

Mr. KING admitted there might be some danger of giving an advantage to the Central States; but was of opinion that the public inconvenience, on the other side, was more to be dreaded.

Mr. GOUVERNEUR MORRIS moved to fix the quorum at 33 members in the House of Representatives and 14 in the Senate. This is a majority of the present number and will be a bar to the legislature. Fix the number low and they will generally attend, knowing that advantage may be taken of their absence. The secession of a small number ought not to be suffered to break a quorum. Such events in the States may have been of little consequence. In the national councils, they may be fatal. Besides other mischiefs, if a few can break up a quorum, they may seize a moment when a particular part of the continent may be in need of immediate aid, to extort, by threatening a secession, some unjust and selfish measure.

Mr. MERCER seconded the motion.

Mr. KING said he had just prepared a motion which, instead of fixing the numbers proposed by Mr. Gouver-

neur Morris as quorums, made those the lowest numbers, leaving the legislature at liberty to increase them or not. He thought the future increase of members would render a majority of the whole extremely cumbersome.

Mr. MERCER agreed to substitute Mr. King's motion in place of Mr. Morris's.

Mr. ELLSWORTH was opposed to it. It would be a pleasing ground of confidence to the people that no law or burden could be imposed on them by a few men. He reminded the movers that the Constitution proposed to give such a discretion, with regard to the number of representatives, that a very inconvenient number was not to be apprehended. The inconvenience of secessions may be guarded against by giving to each House an authority to require the attendance of absent members.

Mr. WILSON concurred in the sentiments of Mr. Ellsworth.

Mr. GERRY seemed to think that some further precautions than merely fixing the quorum might be necessary. He observed that, as 17 would be a majority of a quorum 33, and 8 of 14, questions might by possibility be carried in the House of Representatives by two large States, and in the Senate by the same States, with the aid of two small ones. He proposed that the number for a quorum in the House of Representatives should not exceed 50, nor be less than 33, leaving the intermediate discretion to the legislature.

Mr. KING: As the quorum could not be altered, without the concurrence of the President, by less than two-thirds of each House, he thought there could be no danger in trusting the legislature.

Mr. CARROLL. This would be no security against the continuance of the quorums at 33 and 14, when they ought to be increased.

On the question on Mr. King's motion, that no less than 33 in the House of Representatives nor less than 14 in

the Senate should constitute a quorum, which may be increased by a law on additions to the members in either House—

Massachusetts, Delaware, ay, 2; New Hampshire, Connecticut, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, no, 9.

Mr. RANDOLPH and Mr. MADISON moved to add to the end of article 6, section 3, "and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each House may provide." Agreed to by all except Pennsylvania, which was divided.

Article 6, section 3, was agreed to as amended, *nem. con.*

EXHIBIT F.

[Speech of Hon. John G. Carlisle on the bill providing for the classification of worsted cloths as woolens. Cong. Record, Vol. 21, part 4, Fifty-first Congress, First session, p. 3987.]

It is scarcely necessary for me to say that with the views which I entertain upon the general subject to which this bill relates I would much prefer to equalize the rates of duty between the two classes of goods by a reduction of the duties rather than by an increase. But it will be conceded, I presume, that this is impossible at the present time. The rates of duty imposed now by the law upon worsted cloths to be affected by the pending bill are 18 cents per pound for one class, with 35 per cent ad valorem, and 24 cents per pound for the other, with 35 per cent ad valorem.

This bill does not propose to change the ad valorem rate of duty, and I may say here that the theory upon which the act of 1883 was constructed was that the specific duty of so many cents per pound was to compensate

the manufacturers of these goods for the duty they were required by the law to pay upon the wool used as a material in their production and the protective duty was the 35 per cent. ad valorem. This bill, therefore, does not propose to change the protective duty, but leaves it at precisely the same rate at which it exists in the statutes to-day. The effect of the bill will be simply to raise the specific or compensatory duty upon these two classes of goods from 18 cents in the one case and 24 cents in the other to a uniform rate of 35 cents per pound, and thus place them upon the same footing precisely as woolen cloths of the same value.

Ever since the passage of the act, or at least almost ever since the passage of the act of 1883, manufacturers of these worsted cloths, conceding that the law was as I have stated it, have been appealing to Congress to have it changed by legislation, upon the ground that it discriminated unjustly against them, for they insisted that they had to purchase the same kind of wool and use the same quantity in the production of their fabrics as the manufacturers of woolen cloths had to purchase and consume in the production of theirs.

The justice of the claim was recognized by the Secretary of the Treasury, Mr. Fairchild, who recommended a change in the law by legislation, which was the only proper way, so as to remedy the defect; and it was recognized by the Committee on Ways and Means in the last House of Representatives, which reported it in the bill known as the Mills bill, and recommended that the rates of duty on these classes of goods should be equalized in the manner proposed here, and almost, if not identically, in the same language as this bill.

It is true, as stated by the gentleman from Kentucky (Mr. Breckinridge), that the equalization was proposed in a bill the purpose of which was to reduce the duties upon the manufactures of woolen cloths as well as worsteds. That bill proposed to put wool upon the free list, which

would dispense altogether with the necessity for a specific duty per pound upon woolen and worsted cloths, which duty, as I have already said, is the compensatory duty imposed because of the duty levied upon raw wool itself; and that bill proposed to levy upon both classes simply the ad valorem rate, which has always been claimed as the only protection the manufacturers have.

I much prefer that method of correcting the inequality, and, if I could secure the passage of such legislation as I desire upon the subject, these gentlemen would be given their wool free of duty and the specific duty upon the manufacturers would be repealed, leaving them a reasonable ad valorem rate upon the finished product. But that can not now be done, and the situation which confronts us is simply this: In May last the present Secretary of the Treasury, in the very face of the law, as I understand it, and as I am sure the courts will construe it (one having already done so), decided that no legislation was necessary in order to correct this inequality, although the manufacturers themselves had conceded that it was for many years, and that under the law as it then stood he would direct the customs officers of the United States to impose a specific duty of 35 cents per pound and an ad valorem rate of 35 per cent. upon worsted cloths as well as upon woolen cloths, and in accordance with that the United States customs officers at all of the ports of the country have been from that day to this, and still are, collecting this high rate of duty.

It may be that this decision coming suddenly upon the importers of these cloths caught many in the condition where they would sustain some losses, because, as I understand the course of business in these matters, it is frequently the case that the importers of goods have actually contracted and sold the goods to be imported before their arrival. In such cases, of course, the importer who had made contracts abroad for the goods and at home for their

sale upon the rate of duty imposed by the statute would lose the difference between that and the higher rate imposed by the decision of the Secretary of the Treasury. But, sir, from that time to this these gentlemen have been importing these goods, paying the higher rate under protest, and bringing suits in the courts of the United States to recover it back, and only a week or so ago, in the circuit court of the United States, in the city of New York, it was held that the higher rate was unauthorized.

Therefore, they will necessarily, if this decision is affirmed by the Supreme Court of the United States, of which I have no doubt, recover from the public Treasury all duties paid in excess of the 18 cents and 24 cents, respectively, they having already added that to the selling price of the articles and received it from the consumers. This part of the evil we can not now correct. This result follows from the erroneous decision of the Secretary of the Treasury, and we can not, I say, prevent it or correct it at this time. But we can prevent the importers of the goods from continuing, from this time on until the Supreme Court decides the case, to charge the increased rates of duty to the consumers, and then coming back afterwards and claiming the amount from the United States Treasury.

The Secretary of the Treasury, notwithstanding the decision of the United States court in New York, is continuing to collect the higher rates of duty, and will continue to collect them until that decision is affirmed by the Supreme Court; so that the consequences which I have stated must inevitably follow, provided the Supreme Court sustains the decision of the court below. The consumers of these goods will be compelled to pay many hundreds of thousands, perhaps millions, of dollars, because I am not prepared to state the amount of the difference between the lower and higher rates of duty on the imported goods, and then the importers will go into the

court, having paid these duties under protest, and recover them back again from the Treasury of the United States.

Now, I submit, Mr. Chairman, without regard to the question of rates of duties, whether in view of this situation it is not the duty of Congress to protect the people and the Treasury against this wrong. That there is a discrimination made in the law itself between manufactures of worsted cloths and the manufactures of woolen cloths is conceded, as I have said, by everyone, and by my colleague from Kentucky to-day, a discrimination which everybody admits ought to be corrected, and the only serious objection which I have heard against the passage of this bill is that it is special legislation upon this one subject.

Mr. Chairman, according to the view I have taken of it, the situation in which we are placed justifies special legislation upon this subject for the protection of the people and the public Treasury. If it were purposed in this bill or in any other bill to increase the so-called protective duty upon these articles or this class of articles, I would vote against it and resist it with all the power at my command, but when it is simply asked that these gentlemen shall be placed upon the same footing with regard to these specific or compensatory duties with the manufacturers of woolen goods, without affecting the question of protection at all, I can not see any valid objection to it.

Now, Mr. Chairman, I have thought it proper to make these remarks for the purpose of explaining the reasons why I feel compelled to concur in the passage of this bill. I do not go into the discussion of the question as to what ought to be the rates of duty upon these two classes of goods. I accept the situation as we find it, a situation which we can not change, but the evils resulting from which we may avoid by this legislation.

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JAMES H. McKENNEY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 1061.

THE UNITED STATES,

Appellant,

against

BALLIN, JOSEPH & CO.

BRIEF FOR APPELLEES.

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Supreme Court of the United States.

OCTOBER TERM, 1891.

THE UNITED STATES, Appellant, vs. BALLIN, JOSEPH & CO.	No. 1061.

BRIEF FOR APPELLEES.

Statement.

In July, 1890, the appellees imported into New York certain manufactures of worsted, containing no wool, which they claimed to be dutiable as manufactures of worsted, at the rate prescribed therefor in Schedule K of the Act of March 3, 1883, c. 121. (22 Stats. 509 top.)

The collector assessed them for duty at the rate prescribed in that Schedule for manufactures of wool. (22 Stats. 508 bottom.)

This was not because of any difference between the custom-house officers and the importers as to the actual composition of these goods, but because the collector considered himself bound to adopt the course he did, in supposed obedience to this act of Congress;—

CHAP. 200.

An act providing for the classification of worsted cloths as woolens.

Be it enacted, &c., That the Secretary of the Treasury be, and he hereby is authorized and directed to classify as woolen cloths all imports of worsted cloth, whether known under the name of worsted cloth, or under the names of worsteds, or diagonals, or otherwise. (26 Stats. 105.)

Approved, May 9, 1890.

The importers protested against this exaction, challenging both the existence and the application of this law.

It was alleged that no such act passed at any time when a majority, or quorum, of the House of Representatives was present; that no quorum voted thereon; and that it was certified to have passed when it had not passed, contrary to the fifth section, Art. 1, of the constitution of the United States. (Rec. 5, 6.)

If legally enacted, it was protested that the act did not profess to, and did not, change the before-prescribed duty upon manufactures of worsted, under the act of March 3, 1883; that the Secretary of the Treasury never did, in fact, classify these goods; and that, if he did, such classification would not affix to them the woolen duties exacted thereon. (*Ib.*, 6.)

The Board of General Appraisers, from the evidence, found these facts:—

(1.) *That the goods in question are worsted, and not woolen, goods.* (Rec. 11.)

(2.) *That the Secretary of the Treasury never examined or classified the goods* in question. (*Ib.*)

(3.) That the Journal of the U. S. Ho. of Reps. shows the facts attending the passage of the act of May 9, 1890, thus;—*(Ib.)*

The speaker laid before the House the bill of the House (H. R. 9548) providing for the classification of worsted cloths as woolens, coming over from last night as unfinished business, with the previous question and the yeas and nays ordered.

The House having proceeded to the consideration and the question being put,

Shall the bill pass?

There appeared

Yeas—138.

Nays—0.

Not voting—189.

The said roll-call having been recapitulated, the *Speaker* announced, *from a list noted and furnished by the Clerk*, at the *suggestion* of the *Speaker*, the following-named members as present in the hall when their names were called, and not voting, viz.:

[Here follows an alphabetical list of the names of seventy-four members.]

The Speaker *thereupon* stated that the said members present and refusing to vote (74 in number) together with those recorded as voting (138 in number) showed a total of 212 members present, constituting a quorum present *to do business;* and that the yeas being 138 and the nays none, the said bill was passed. (Rec. 19.)

The sole issue between the parties is as to the legal effect of the three facts found as above-stated; all the proceedings to raise this issue having been seasonably taken, in due form.

The Board of General Appraisers concluded that the legal result of these facts was in support of the action of the Collector (Rec. 6, bot.); while the Circuit Court, upon appeal, ruled that they sustained the protest and contention of the importers. (*Id.* 22, top.)

The decision of the Board was therefore reversed, and

"It is further determined and adjudged that the correct denomination of said merchandise is 'manufactures of worsted,' and that duty should be assessed thereon under Schedule K of the Act of March 3, 1883, as manufactures of worsted, and not otherwise." (Rec. 22, top.)

By appeal from this judgment, the Government brings the case here.

POINTS.

Two questions are presented; *first*, as to the existence of this supposed law; *second*, as to its true construction, if valid.

Was there any such statute as that upon which the collector relied to justify his action and exaction? if so, did it (under the facts stated) constitute such justification?

This is the natural and logical sequence of our discussion, since a negative response to the first inquiry dismisses the second; while an affirmative reply to the former would only bring us to the starting point of the consideration of the latter; to where statutory inquiries usually commence.

I.

As to the existence of the law.

A "law is a command to a course of conduct" (Austin) restraining with its 'shall' and 'shall not' the liberty of the citizen. Statutory law, which concerns us here, is defined by the Louisiana Code as a "*solemn* expression of the legislative will;" that is, one made in due form, as directed by the constitution.

To compel obedience to any will not having the requisite sanction is tyranny, and not the reign of law.

Therefore, we could never conceive this Court to be precluded by any mere form of authentication, by the signature of any functionary however high, under the Great Seal of the State or the lesser one of a department, from examination to determine whether any professed Statute had been enacted in the manner required by the Constitution. (6 Wall. 511.)

Where subjection of the great mass of the people to

the will of a (comparatively) small body is concerned, forms—especially those sufficiently important to be prescribed by the Constitution—are substantial; and the Court will see whether there has been compliance with them.

Deference to the opinions of several respectable courts (though these were governed by the peculiar provisions of their respective State constitutions) led us to fully consider this subject in the Sternbach (tariff) case, No. 1050 of the present Term; and to that brief we now beg leave to refer.

In the present argument, we shall treat the point as settled by

Gardner v. Collec'r, 6 Wall. 499.

The fifth section, Art. 1, of the constitution constitutes a majority of each House a quorum to do business; requires a journal to be kept of its proceedings; upon which, at the desire of one fifth, the yeas and nays of the members upon any question are to be entered.

May 9, 1890, the membership of the House was 327; (Rec. 49) so that 164 constituted a quorum to pass this bill, which then came up "as unfinished business, with the previous question and the *yeas and nays* ordered" thereon. *(Ib.)*

Only 138 members voted upon the question of its passage *(Ib.)*; so, upon the record of everything which *the constitution* directs to be entered, the bill had failed.

Then followed the proceeding which, in no previous Congress of a full century's history, finds either precedent or parallel.

"So far as it relies on authority, it fails in precedent; and so far as it rests on principle, fails in reason." (9 B. & S. 538.)

At the conclusion of this roll-call, the *clerk* of the

House furnished a list, *noted by him*, which the Speaker assumed as the basis of an announcement that the seventy-four named members were present when their names were called, but not voting. (Rec. 19.)

Besure, this list was kept "at the *suggestion* of the Speaker" *(Ib.)*, but it was the *clerk's* notation;—the Speaker's announcement was no more than a phonographic repetition of the clerk's verdict. "The voice is Jacob's voice, but the hands are the hands of Esau;" and the hands then, as now, prevailed over the voice.

The noting and furnishing of such a list, whether of his own volition or at the suggestion of the Speaker, is equally outside his duty as clerk. Officially, he is the clerk of the body, not the private secretary of its presiding officer. He can oblige the Speaker by the performance of any act, or compliance with any "suggestion," not interfering with the discharge of public functions; but the mere fact that the occupant of the clerk's desk does it, or does it at the Speaker's request (or *order*, if you please) will not make it an *official* act, entitled to be spread upon the constitutionally-required Journal of the "proceedings" of the House. In keeping this record, his clerical action is almost as mechanical as that of the pen he wields. He has no more right to transcribe *his own* notation, list, determination, therein than has any messenger or page upon the floor.

If he possesses the right to ascertain (otherwise than upon a call of the House) by private tally, the fact of the presence of irresponsive members, he will do this only and so often as it suits his purposes.

If he have not this right generally, no personal "suggestion" of the Speaker to him can confer it. Neither the making of such a suggestion, nor compliance with it, is a discharge of duties pertaining to the Speaker or to the Clerk.

If the Speaker wishes to know the number of mem-

bers present, he cannot entrust the ascertainment of the fact to the Clerk, so as to make it a basis of *official* action on the part of either. The statement of a "suggestion" by the Speaker to the Clerk implies merely a personal communication by one to the other, and not a "proceeding" of the House as a body; and it is *only* "the proceedings of the House" that the Clerk is authorized to enter upon its Journal.

Less conscientious persons that those who filled these positions May 9, 1890, may come to occupy them. Then, if they desire a bill to pass, noses are counted; if not, either the Speaker omits to make any "suggestion," or the Clerk's perceptive faculties fail to recognize a sufficient number present to make up a quorum. If the Clerk desires a bill to fail, his eyes will not serve him quite so completely as if he wished it to pass. Those who omit to vote will not resent being overlooked.

The question is not what *will* happen, but what *may* ensue as the consequence of the adoption of the course pursued with reference to this bill.

The entrance of a member into the House; his sitting at his desk; or rising and going out; are none of them "proceedings of the House," but of that particular individual; and no action of the Speaker and Clerk, had of their own motion (or otherwise) severally or conjointly, can make either the presence or absence of a gentleman a "proceeding" of the body to which he belongs. Hence, it is not recording any such proceeding for the Clerk to write in the Journal that he noticed Archibald Yell standing in the lobby, or Delusion Smith in the door-way of the cloak-room, or in any other part of the hall; nor is it an authorized record for him to inject into the Journal that the Speaker "announced" that the Clerk reported to him the noting of such a circumstance.

If *the House*, as such, desires to know who is present and who absent, it can ascertain this by a direct

"proceeding" ordained for this purpose, known as a "call of the House;" and, pending this, no other business can go on—nor can it be conglomerated with this. Upon a vote, the absence of a quorum may *incidentally* seem to appear; but the ascertaining of a vote, upon a pending question, and the ascertaining of a quorum are essentially different facts, not to be mixed up together.

Page 19 of the record tells us that this bill came up as "unfinished business, with the previous question and yeas and nays ordered;" and the question to be determined was *not*—as it would have been upon a regular call—the existence of a quorum, but—"Shall the bill pass?" *(Ib.)* A total vote of but 138 upon *that* question, so put, was a legislative and constitutional determination that it should not pass. Yet, solely upon the strength of the clerk's notation, the Speaker stated it had passed.

It would have been just as little a proceeding of the House had the Speaker himself made the notation, instead of delegating that task to the clerk, and accepting his report of the result.

For either of them to glance around, while the business of the House is going on, and observe who are present, is no proceeding of the House.

Consequently, the result of such observation has no rightful place upon the Journal, and is to be treated like any other unauthorized certification or record—as a nullity. The unauthorized statement, notation and entry of the clerk, even though accepted by the Speaker as true, cannot make that bill a law which, without it, would not be law.

Another observation arises upon the peculiarity of the phraseology of the Speaker's declaration. He stated that the 74 present and refusing to vote added to the 138 voting "showed a total of 212 members *present*, constituting a quorum present *to do business*." (Rec. 19.)

Doubtless, this formula was thought out in advance; and it shows mental recognition of the very distinction it seeks to confound or ignore, viz.; between members physically present, and "present *to do business*."

The Constitution constitutes a majority "a quorum to do business;" but this clause is manifestly permissive;—that a less number shall *not*, but that a majority *may*—not that they *must*—whether they will or no—do business.

The Speaker's ruling confounds mere presence with doing business;—makes these terms synonymous.

But whom does the Constitution empower "to do business?"

Certainly, *that majority which makes up the quorum*. This majority, or quorum, if *it* so agree, can do business; but no agreement of any *less* number to the transaction of business is of any avail.

The vote upon the passage of a bill is business of the House, in which they who vote affirmatively and those who vote 'no' equally participate; but those who sit dumb, *while the yeas and nays are being called* do *not* participate in the business, and should not be enumerated.

We emphasize "*while the yeas and nays are being called*," because *these* are what the Constitution requires to be entered on the Journal.

It is the yeas and nays of the members "*on any question*" that are to be so entered.

It is an irresistible implication that the "question" is to be determined according to the result of the yeas and nays so entered; and that they are not to be made effective or ineffective by any extrinsic "suggestion" of Speaker, clerk or member.

"Let your communication be yea, yea and nay, nay; *for whatsoever is more than these cometh of evil*."

The nature and effect of their entry, when made

under this section V., is precisely the same as under section VII. of the same Article, as to bills returned by the President.

"But, in all such cases, the votes of both Houses *shall* be *determined* by yeas and nays; and the names of the persons voting for and against the bill shall be entered on the Journal of each house respectively." Art. I., Sec. VII.

The sole difference intended by the different language is that the request of one-fifth to the entry of the yeas and nays is not required, and that no other mode of determining the passage of the bill over the President's objection is permitted.

Under Sec. V., a bill may pass, without any yea and nay vote; or, if such vote be taken, it need not be entered at length upon the Journal, except one-fifth so request; but there is no escape from the inference that, if the question is so taken, and the entry requested and made, the determination of the question must depend upon the character of *that* entry, or the result *it* indicates, without extraneous qualifications or additions.

We assert this to be the *constitutional* method of determining the question of the passage of a bill; and that, consequently, it is exclusive of and nullifies the following rule, to which the Speaker conformed his action with reference to this bill under consideration:—

RULE XV.

3. On the demand of any member, or at the suggestion of the Speaker, the names of members sufficient to make a quorum in the hall of the House who do not vote, shall be noted by the Clerk and recorded in the Journal, and reported to the Speaker with the names of the members voting, and be counted and announced in determining the presence of a quorum to do business. (Ho. Journal, 230 top. Feb. 14, 1890.)

The power to make rules would have been implied, if not expressly given. (1 Story on Const. §§ 1236 to 1243.)

Groome v. Gwinn, 43 Md. 597.

"Each House may determine the rules of its proceedings," but these rules can prescribe nothing conflicting with any other provision of the Constitution.

McKoan v. Davies, 3 Barb. 198.
Peo. v. Draper, 15 N. Y. 544.

"But every part of the Constitution is equally obligatory; and a power granted, in one provision, must be so exercised as not to clash with a restriction upon power, contained in another provision."

Peo. v. Bull, 46 N. Y. 61.
Barker v. Peo. 3 Cow. 703, 706.
Opin. 117 Mass. 603–4.
Thos. v. Owens, 4 Md. 189.
Exp. Dorsey, 7 Port. 379, 386.
St. v. Thoman, 10 Kans. 191.
Peo. v. Dubois, 23 Ills. 550.
Howard v. State, 10 Ind. 101.
Quinn v. State, 35 *Id.* 491–2.
Fiebleman v. St. 98 *Id.* 522.
McCafferty v. Guyer, 59 Pa. 111–2.
State v. Williams, 5 Wis. 316.
State v. Messmore, 14 *Id.* 179.
St. v. Brunst, 26 *Id.* 414–5.
Clayton v. Harris, 7 Nev. 67.

If the *determination* by yeas and nays, expressly declared by Sec. VII, is implied in Sec. V, it is equally obligatory in the one case as the other. Here, the implication is so strong as to be the equivalent of an express declaration.

Peo. v. Albertson, 55 N. Y. 55.
Thos. v. Owens, 4 Md. 225.
Robb v. Carter, 65 *Id.* 334.

To us, the implication seems clear and imperative. If it be so, of course it is not affected by the power

"to make rules;" but the latter must be construed in subordination to or in harmony with, the specific directions of clause V. The particular direction takes the matter out of general permissive terms.

Pretty v. Solly, 26 Beav. 610.
De Winton v. Brecon, *Id.* 543.
Long v. Culp, 14 Kans. 415 top.
St. v. Trenton, 38 N. J. L. 64.
Scott v. State, 22 Ark. 369.
Peo. v. Potter, 47 N. Y. 380.

"Where the means for the exercise of a granted power [*ex gr.*, to *determine* a question by yeas and nays] are given, no other or different means can be implied, *as being more effectual or convenient.*"

Field v. Peo. 3 Ills. 83.
Peo. v. Draper, 15 N. Y. 544.
St. v. Hallock, 14 Nev. 206.

In the New York case *(ubi sup.)* DENIO, C. J. observes;—

"Every positive direction contains an implication against anything contrary to it, or which would frustrate or disappoint the *purpose* of that provision."

Peo. v. Draper, 15 N. Y. 544.
Lowe v. Com., 3 Met. (Ky.) 237.
Brown v. Grover, 6 Bush, 1.
Com. v. Williams, 77 Ky. 42.
Peo. v. Albertson, 55 N. Y. 55.

As the congressional power to make rules cannot be exerted to require a greater or less proportion than one-fifth to place the yeas and nays upon the journal, it cannot be so exercised as to defeat the great object of resort to this method of determining any question.

It was to determine by and against whose *votes*—not in whose presence—a bill is passed, or defeated, that this clause of Sect. 5 was inserted in Art. 1.

As a constitutional office cannot be destroyed by the exercise of the right to define its territorial limits, nor by taking away its duties and function, neither can the

design of this clause be frustrated by a rule which makes the entry of yeas and nays ineffective for any *legislative* purpose.

State v. Draper, 50 Mo. 353.
King v. Hunter, 65 North Carolina, 605.
Peo. v. Raymond, 37 N. Y. 431.

The yeas and nays taken "on any question" are to be entered, as proceedings of the House thereon, *with reference to their effect upon the question* on which they are taken; not merely to gibbet members before the country, or in the eyes of their constituencies.

The Constitution contemplates that course of procedure with which alone every legislative assembly was familiar prior to December, 1889; that "any question" might be decided in one of two ways, by a count of polls or the call of the yeas and nays thereon; but does not contemplate any composite method, by a compounding of the two; or by a count of the heads after the yeas and nays had been "ordered" (Rec. 19).

Taking judicial cognizance of the House Journal, the Court will perceive that the Speaker did not direct the notation, and make his declaration thereon, in sole reliance upon, nor solely by virtue of, this third clause of Rule XV; hence, we first argue the matter regardless of it, only subordinately introducing it. (Supra, p. 11 bottom).

Prior to its adoption, the Speaker claimed and exercised the right to do this same thing; so, with him (at least) this rule cut no important figure, but was merely a ratification of his previous course by the majority which elected him.

Evidently, this majority and this Speaker assert the right to exist *independently* of this rule, and not *because* of it.

We will merely refer to the examples of such action found on pages 174 to 178 of the Journal—January 29 and 30, 1890—because there accompanied by the Speaker's explanation, to which it is but fair to refer,

though it is too long for us to quote. The Solicitor-General will, no doubt, present the Speaker's argument in the appellants' brief.

Should this Court vindicate the course pursued in the professed passage of this bill (H. R. 9548) through the House by reason of this rule, its judgment will rest upon a ground upon which this right was not originally asserted and exercised.

However the Court may decide, it is of the greatest *public* importance that this question be settled by the highest tribunal, even though not vital to our private claim.

It fairly presents itself upon this record, for decision.

The Speaker's contention goes to the extent of claiming that a record of two yeas against one nay would entitle him to declare the passage of any bill, however important, if the Clerk (upon the suggestion of any member) noted and reported his (the Clerk's) recognition of 162 silent members present.

Manifestly, it is the Clerk's recognition that passes the bill in any such case, and not any action had by the representatives of the people.

Still more clearly would it be legislation by clerical recognition, if the recorded yeas were 82 against 81 nays of record, and the bill should be declared to have passed upon the basis of the Clerk's report that he saw Mr. Abbott or Mr. Zollicoffer, hat in hand, on the point of going through the door when the name was called. Besure, the Clerk may not make his report in this detail; but he does go through the mental operation of determining whether or not Mr. Abbott was on this or that side of the door when the roll-call commenced with his name.

This suggests the thought that it makes a difference *when*, in the course of the roll-call, the Clerk makes his notation. It appears from the Journal and Rule XV cl. 3, that the Clerk's notation of Mr. Abbott (say), as

present and not voting, is made *at the moment that gentleman's name is called*. A roll-call takes nearly an hour for its completion; and *until then* the bill certainly has not passed. Before Mr. Zollicoffer has had an opportunity to vote, Mr. Abbott may be in or near Baltimore; so that, while it may be that he could be truly counted as one of a quorum when the call commenced, he could *not* when the call closed and the question of the passage of the bill was determined. He had *not* aided its decision by yea or by nay; only (it is claimed) by his mere presence; but that may have been—no doubt, very frequently is—wanting when the determination is to be ascertained and declared.

If a member *votes*, yea or nay, upon the bill, the journal bears evidence of this participation in the business of determining the pending question, whether he remain in his seat throughout the call or not. That call cannot be *interrupted* to ascertain the presence of a quorum; and its result should be declared so soon as reached. Thereby the lack of a quorum may incidentally appear; but only as an incident, and not as an independent, otherwise-ascertained, fact.

The yea or nay *vote* ascertains the legislative presence of the voter, at the determination of the question upon which he votes; and, until the announcement of the result, he may change his vote. Not so with the clerk's notation of a man's presence when his name is called. Thereby, against his will, he is made to appear as if present at the *determination* of a question, when actually he might then have been miles away.

The existence of a quorum must have relation to *some* point of time. We say it is that time during which business is transacted. If the quorum fail while business is going on, that business must stop.

The Solicitor-General's contention must be that—either without or under the third paragraph of Rule XV—the mere minuting of a man's presence, when his

name is called, establishes the fact that he remained until the pending question was decided.

The fallacy of this position is easily shown.

If the memo. that Mr. Abbott was within the hall when his name was called is any evidence of his contributing to make up the quorum which decided the pending question, then the presence of every other member must be referred to that same moment of time—*i. e.* at the *commencement* of the call;—for that A is present at one o'clock and Z at two has no tendency to establish the fact of their *uniting* to make a quorum at either hour.

Suppose a thing that has repeatedly happened in State legislatures to occur in Congress: that, instead of Mr. Abbott alone retiring as his name is called, a sufficient number (say 74) of other members depart with him, so as to leave but 138 out of a full House of 327, in the hall: would these 138 be constitutionally entitled to decide the question pending, by reason of a quorum being in attendance at the beginning of the roll-call? If not, the mere fact that Mr. Abbott, or any other one member, was *then* present has no bearing, in determining that the bill has passed.

This serves to place in another light the same error of which we complain in the outset of our argument;—the substitution of a clerical noticing of *individual* action for the recorded yea and nay vote which, constitutionally, is part of that business of the House upon which they are uttered.

In the North American Review for July, 1890 (Vol. 151, pp. 90 to 111) is an article upon "Speaker Reed's Error," evidently contributed by a writer of experience in congressional matters.

That article clearly brings out (p. 95) the fact that this third section of Rule XV is futile and inapplicable in the case of a bill returned by the President. The writer supposes the vote to pass the bill over the veto to be ninety yeas to forty nays; and asks if the

Speaker could count, or cause the Clerk to count, thirty-six non-voting members as present, and then declare the bill passed by a two-thirds majority?

The article referred to is convincing that "the tyrant's plea"—necessity—cannot successfully be set up in justification of this course, first adopted in the LI Congress. It points out other ample remedy for any real or supposed evil of absenteeism.

The country's demand cannot be very importunate for that legislation which cannot command the presence of a bare majority of the people's representatives, to advocate or oppose.

With this branch of the subject we have nothing to do here, except as the supposed mischief of one construction may incline the mind to another; and a mischief which only develops itself at the beginning of the second century of our history can hardly be imagined to have dictated or affected the selection of the phraseology employed by the framers of the constitution.

The Solicitor-General must base his vindication of this bill (H. R. 9548) as law upon the theory that, while the yeas and nays may be determinative upon the question of overpassing a presidential veto, they are not so upon the original passage of the bill. We cannot imagine the court to take any such view; or to hold that there is any difference, between the provisions of Sec. V and of Sec. VII as to the *effect* of recording the yeas and nays, but only as to the unconditional necessity of such record under the latter section as compared with the qualified one of the former.

If the course pursued by the Speaker is here defended upon the theory he has enunciated in its support, it will be assumed as a postulate "that all methods of determining the consents of the members are of *equal* value, by each of them laws are passed which have equal validity;" and, as a neccessary deduction,

that *therefore* they may be intermingled and confounded.

Denying the premise, we add that (if sound) it would not justify the conclusion.

The Speaker instances the rising vote, that by tellers, and the yeas and nays; all well-known methods of procedure. The one he actually adopted was *neither*. These specified means of ascertainment are *not* "of equal value" *in determining the question of consent;* though, whenever that question is finally determined in either way, the *effect of consent* is the same (119 U. S., 449). It is because they have *not* the same probative force that they are employed cumulatively—in a crescendo scale. *Because* the stand-up count is unreliable (since a member may be counted who merely arises to retire, or to greet a friend) tellers are called for; *because* this is an unsatisfactory method, the constitution gives one-fifth the right to *demand* the yeas and nays, and that these be entered upon the Journal. It is absurd to call upon men to "*stand up* and be counted," if they are to be counted whether they rise or not. Marching between tellers is a ridiculous farce, if those who do not fall into line are to be equally counted, and equally affect the result, with those who do. Just the same is a call of the yeas and nays futile, if the determination is nevertheless to be made by a *per capita* count.

Neither the present Speaker nor any predecessor ever attempted to give effect to a rising vote, or one by tellers, by supplementing it with a catalogue of those quiescent members whom the clerk's eye discerned. Then the more solemn form of voting should not be dovetailed into a count of polls.

That the three specified methods are not of equal *constitutional* value in determining the question of consent—any more than they are in common apprehension—is manifested by the recorded yeas and nays being made demandable of right (which the other methods are not) and being positively required upon the solemn

occasion of acting with reference to the stated objections of the executive.

If of equal *value*, these methods might be indiscriminitely employed to verify each other, without any special or uniform order of sequence; a yea and nay record might be verified or corrected by a rising vote, or by tellers' count, etc. The successive use actually made of them indicates relative value; and we complain that the highest and most certain method is adulterated by one novel and most questionable, which is not applied to either of the less valuable methods of determination.

The Speaker's proposition is that, being of equal value, they may be commingled; conversely, ours is that, not being of equal value, and having no affinity, they can not mingle.

If they were of equal value, and each deemed worthy of constitutional mention, this would simply imply that either method might be employed; not a compound, which is neither.

Three methods of ascertaining the will of the House are designated, each complete in itself, except as there may be an appeal from one to the other. If a stand-up vote sufficiently indicates the sense of the House, this determines, without more; if a teller's count clearly ascertains, it determines, without more; if a yea and nay vote be demanded, that *must* determine—and there is no room for more. It is a subordination of the greater to the less, to make the effect of the recorded vote depend upon a count of heads.

In the Illinois senatorial debate, Mr. Douglass said Mr. Lincoln once recommended, as an improvement upon the judicial system, an appeal from their Supreme Court to three justices of the peace; whereupon Mr. Lincoln interjected the explanation that when this recommendation was made Judge Douglass was upon the Supreme bench.

Effort has been made to support the method of legislation of which we complain by resort to the maxim that "silence gives consent":—the inapplicability of which is easily shown. We refer to it only to further illustrate an error to which we have already adverted.

This maxim

"Presupposes a declaration or proposition made to him which he is *bound* either to deny or to admit." DUNCAN, J.

Moore v. Smith, 14 S. & R. 393;—

But

"A person who stands by and does nothing, *where he has no power to dissent* from *the act* which is taking place, cannot be considered as assenting to it."

Morgan v. Thomas, 8 Exch. 304.

If the vote is taken by rising, or by tellers, any member can raise the point of 'no quorum'; but when "the yeas and nays are ordered" (Rec. 19) no member can interfere, or interrupt the call. If the lack of a quorum *incidentally* appears by the result, it is as fatal to a determination by this method as by either of the others.

Even where applicable—which it is not to a legislator—this maxim only means that silence implies assent to "the proposition made." The proposition presented upon a yea and nay vote is, in substance and effect;—"what say you, Mr. Abbott, etc., yes or no, as to the passage of this bill?' The "order" is for members to say 'yea' or 'nay.' Silence no more implies the one than the other. It implies neither. It implies nothing, unless that the irresponsive (or absent) member leaves those present and voting to determine it, *if they can*. He neither helps nor hinders. When the Constitution requires the query 'How do you vote?' to be answered by 'yes' or 'nay,' refusal to vote implies no more than just what it is—*a refusal to vote*. If the theory maintained by the Government were correct, the Speaker

could count every silent member present as voting for the bill; an idea so untenable that it has never been entertained or (at least) expressed.

The Speaker only claimed to count them as part of the quorum; as assenting (or obliged) to be part of the Quorum, and agreeing that business may be done; —but (as already noted) *this* is not the question presented to them.

We believe the construction for which we contend to be the obvious and natural interpretation of the constitutional language employed, as its first perusal; and have offered the foregoing suggestions as tending, by subsequent examination and reflection, to confirm the impression naturally made by the first reading of the constitutional provisions of these sections V and VII of Article I.

II.

As to the construction of the law.

The nature of the question presented in the first division of this brief has so greatly interested us, and is of such general interest, that we have allowed ourselves to consider it at greater length than its undoubted relevancy to this case requires, since it is not *decisive*.

Even if this bill, H. R. 9548, became law, it does not authorize the collector's exaction of duty from us upon our importations.

The goods were wholly worsted, imported prior to Oct. 6, 1890. (Rec. 11.)

The act of March 3, 1883, dutied them at the rates claimed in our protest. (*Id.* 5.)

There is no claim that these rates had been sub-

sequently changed unless by this act of May 9, 1890. (Ante, p. 2.)

I. This act, upon its face, does not purport to impose or establish rates of duty; and it must be construed, and the legislative intent therein discovered, according to the meaning of the language employed.

Legislators, as "men whose intentions require no concealment, generally employ the words which most *aptly* and *directly* express the idea they intend to convey."

Gibbons vs. Ogden, 9 Wh. 188.
Newell vs. Peo. 7 N. Y. 119 top.
Ritter vs. Ritter, 39 Pa. 398 bot.

"Of all our statutes, those which are for the enforcement of taxes ought to be expressed with the greatest clearness and simplicity. Individuals can not meet the Crown as they can do each other. There is no department of the law in which the subject is more jealous of his rights—more suspicious—more prompt to be excited by the smallest symptom of injustice—and more resolute, before yielding willing obedience, to know how, and by whose authority he is charged." 84 Edb. Rev. July, 1846, p. 131.

Hartranft v. Wiegmann, 121 U. S. 616.
Adams v. Bancroft, 3 Sumn. 387.
Girr v. Scudds, 11 Exch. 191.

The considerations which should determine the selection of the terms of a statute, and the method of construing these terms, are well expressed in the article from which the foregoing quotation was taken.

"There are three different parties to whose intelligence the legislative draftsman must address his labors—the legislator, whose will he expresses; the people, who are to derive from this expression the rule of their conduct; and the judge who is to decide, when it becomes a question, whether or not the law has been obeyed.

It is not the *intention* of the legislator that consti-

tutes the law, but *the words in which he has permitted that intention to be expressed*. His views and designs cannot be matter of inquiry; and if by any accident he has sanctioned a law which the judge interprets in a manner directly the reverse of that in which the legislator understood it, it must be so put in execution; for *the public have a vested interest in the law as it stands, not as it was intended*. The draftsman, therefore, must not be content with announcing his propositions so as to please his own taste; he must so construct them that, according to what he knows of the method in which judges construe language, they shall receive from the bench an interpretation corresponding with the desire and intention of the legislature. To accomplish this, it is not sufficient that he expresses his meaning in language sufficiently clear to receive the right interpretation from an impartial critic. He lays his work before a public *who are entitled each to interpret it in his own favor*; and to found upon any reading that supports his own views, whether it be in conformity with the intention with which the measure was prepared or not."

84 Edinb. Rev. (July, A. D. 1846) 117–8.
Peo. v. Draper, 15 N. Y., 532, 545, 555.
Elev. RR. 70 N. Y. 351.
Peo. v. Albertson, 55 *Id.* 55 top.
Sturgis v. Crowinshield, 4 Wh. 202–3.

Common-law rules of construction prevail in this Court.

Charles v. Warren 11 Pet. 545.
Rice v. R. R. 1 Black, 374–5.
McCool v. Smith, *Id.* 459.

Coke says; *Iudex animi sermo*. Edrich, 5 Rep. 118 b.

COCKBURN, C. J. "We must consider what the acts of Parliament *actually say*, and not enter upon some remote speculation as to what the legislature intended.

Palmer v. Thatcher, 3 Q. B. D. 353.
Coxhead v. Mullis, 3 C. P. D. 442.
Jones v. Smart, 1 T. R. 44.
Everett v. Wells, 2 M. & Gr. 277.
Logan v. Earl, 13 Beav. 29.

LOWRIE, C. J. "The legislature certainly have no such authority over us as to change the laws of language. *If given language does not convey a given meaning, they can give us other that does; but this will not change the meaning of the former language.* In the very nature of language, that is impossible. . . . . The meaning of the law being the law itself, the law can be no older than the *effectual* expression of it." . . . . (39 Pa. St. 144.)

After observing that, to sustain plaintiff's contention in that case would be to violate the plainest principles of interpretation, the chief-justice added;—

"It expresses no such thing; and the act of 1859 cannot change its nature.

Arbitrary interpretation is no interpretation at all; but only a substitution of one man's language and meaning in place of the language and meaning of another. True interpretation is the ascertainment of another's meaning from *his* expressions, not from our thoughts and wishes."

Reiser v. Wm. Tell, 39 Pa. St. 144.

"If there could be any doubt upon the subject, it is removed by the act of 1835, which substitutes for the rule of descent here under consideration, the one which we are asked to apply. Were we to adopt the construction claimed by the plaintiff's counsel, instead of adjudicating, we should legislate. That we have no power to do. Our function is to execute the law, not to make it.

Poor v. Considine, 6 Wall. 480 top.

Chief Justice MARSHALL's expression was; "The law is the best expositor of itself."

Pennington v. Coxe, 2 Cr. 52.
Henderson, 14 Wall. 68 top.

A later expresion of the same idea was;

"This is a legislative act, and is to be interpreted according to the intention of the legislature, *apparent upon its face.*"

Wilkinson v. Leland, 2 Pet. *662.

U. S. v. Fisher, 109 U. S. 145.
Charles v. Warren, 11 Pet. 544.
Aldridge v. Williams, 3 How. 24.
Butler v. Leibold, 107 Pa. St. 407.

In the before-cited English case, construing a professed revenue law, the Court said, by its C. B. (POLLOCK);—

"It is sufficient to say that we ought to read the language of the Statute *most beneficially for the subject.*
Girr v. Scudds, 11 Exch. 191.

It was in a case under the "Compromise Act" of March 2, 1833, c. 55, § 4 (4 Sts. 630) that Judge STORY, after observing that laws avowedly "imposing duties" (as that act did—*Ib.* 629) "are never construed beyond the natural import of the language," added;—

"AND DUTIES ARE NEVER IMPOSED UPON THE CITIZENS UPON DOUBTFUL INTERPRETATIONS; for every duty imposes a burden upon the public at large, and is construed strictly, and must be made out in a clear and determinate manner *from the language of the Statute.*"
Adams v. Bancroft, 3 Sumn. 387.

This Court recently cited this case, interpolating "vague or;" *i. e.*, as duties are never imposed on the citizen upon *vague or* doubtful interpretations;" the phraseology adopted being that of NELSON J. in Powers v. Barney, 5 Blatch. 203.
Hartranft v. Weigman, 121 U. S. 616.

The case of U. S. v. Isham, there cited, quotes this sentence from the above-mentioned opinion of POLLOCK, C. B;—

"A TAX CANNOT BE IMPOSED WITHOUT CLEAR AND EXPRESS WORDS FOR THAT PURPOSE." (17 Wall. 504, item 4th.)
U. S. v. Wigglesworth, 2 Story, 373–4.

The distinction indicated in these quotations, to which we invite attention is this;—That where an act

professes to lay a tax, only the *least sum* its terms permit will be exacted;—if it does *not*, on its face, "from the language of the statute," in "*clear* and *express* words" lay *any* tax, none can be imported into it by interpretation or construction.

In other words, it is begging the question for the Solicitor General to assume this act to be a tariff-law, and, upon such unfounded assumption, ask to have it construed accordingly. It must first be made to appear, *from the act itself*, that it *is* a tax-law, before any such alleged purpose of its enactment can be considered in its construction.

Even where the character of the legislation was apparent upon its face, the courts have deemed it improper to add a single word to its language, to make it effective or reasonable.

"It is not for courts of justice, *proprio marte*, to provide for all the defects or mischiefs of imperfect legislation."

Smith vs. Rines, 2 Sumn., 355.

TINDAL, C. J. "I do not see how we can put the construction upon this act which we are called upon to do, without adding to it a distinct and substantive provision."

MAULE, J. "The argument on the part of the defendants seeks to introduce into the act a proviso which is not found there."

Everett v. Wells, 2 M. & Gr. 276, 278.
Jones v. Smart, 1 T. R. 44.

A statute required notice of parish rates to be given in the church of the parish. A rate laid in a parish *having no church* was held illegal, for want of this notice!

"Very likely a provision for publishing a rate in places where there is no church was omitted from

these statutes through a slip; but, if so, it is for the legislature to remedy it."

Q. v. Dyott, 9 Q. B. D. 50.
Hancocks v. Lablache, 3 C. P. D. 201.

To be valid, a bill of sale, under an English statute, was required to be attested by a solicitor, and the attestation clause to recite that he had explained the instrument to the vendor before execution;—held, that the bill of sale (having this clause) was *not* invalidated by proof that no such explanation was given.

Nat. M. Bk. 15 Ch. Div. 51, 52.
Exp. Bollard, 21 *Id.* 543.

In Penn. "two disinterested and credible witnesses" required to prove a will;—held, they need not *attest* its execution.

Coombs, 105 Pa. St. 159.

A law restricting the power of testamentary disposition of property in favor of a woman with whom the testator lived "in adultery" was held inapplicable against a woman with whom the testator long lived in *fornication*.

"It may have been the purpose of the act, but it has not said so."

Hull v. Hull, 2 Strobh. Eq. 179 bot.
Dearborn v. Brookline, 97 Mass. 466.
S. W. R. R. v. Cohen, 49 Ga. 627.

"It is not our province to supply defective enactments by an attempt to carry out fully the purposes which may be *supposed* to have occasioned these enactments. This would be but an assumption by the judicial of the duties of the legislative department. It may often be quite uncertain, as it is in this instance, to what extent and in what manner, if any, it was designed they should be carried out."

Swift v. Luce, 27 Me. 286 bot.

As there is no ground in its phraseology for assuming classification under this act to be for revenue purposes, neither can the existence of any "public policy" to have this construed as a revenue classification be assumed in the absence of a statement of any such purpose.

"It has been urged that the public policy requires such an imperative construction of the clause for the public security. But it is a sufficient answer to the suggestion, that no such public policy is avowed or can be inferred from the general terms of the act."

Minor v. Mech. Bk. 1 Pet. 64.
Exp. Powers, 25 Vt. 265.
Com. v. Schopp, 1 Woodw. 129 mid.

"What is termed the policy of the government, with reference to any particular legislation, is a very uncertain thing," etc. "It is a ground much too unstable upon which to rest the judgment of the Court in the interpretation of statutes."

Hadden v. Collr. 5 Wall. 111–2.
Smith v. St. 66 Md. 217.

"It is never very safe ground, in the construction of a statute, to give weight to views of its policy, which are themselves open to doubt and controversy."

Munic. v. Kent, 9 Ap. Cas. 273.
R. v. Barham, 8 B. & C. 104 bot.

To a single brief independent act, like this, of four or five lines, the language of the Maryland (and other) courts is peculiarly applicable;—

"Courts cannot *imagine* an intent, and bind the letter of the act to it."

Alex. v. Worthington, 5 Md. 472.
Maxwell v. St. 40 Id. 293.
Smith v. State, 66 *Id.* 217 bot.
Hyatt v. Taylor, 42 N. Y. 261–2.
Frye v. R. R. 73 Ills. 403 top.
Woodbury v. Berry, 18 Ohio, 462.

"Uncertainty and ambiguity are the bane of commerce."

Merritt v. Welsh, 104 U. S. 702 top.

The exposition of the statute contended for by the government

"assumes that the legislature adopted a form of expression quite inappropriate to convey their real meaning, while the subject was unembarrassed by any difficulty in selecting words which would express their intent explicitly and clearly."

Leoni v. Taylor, 20 Mich. 154.

It also assumes this Court will perceive a disguised purpose of taxation, under phrascology not adapted to express it. The Court presumes statutory language to be used in its ordinary meaning; i. e. as a plain man, with that knowledge of his country's law which it imputes to him, would read it. No such man, with that knowledge, would read this statute as the Collector did.

Although the Court will not consider the motives of Congress, nor hear the utterances of individual members *in debate*, it will take judicial cognizance of the constitutionally kept and published Journals of the House and Senate.

This is the distinction stated in Endlich on Interpretation, §§ 30 to 33.

Blake v. N. Bk. 23 Wall. 317.
U. S. v. U. P. 91 U. S. 79.
Saratoga, 9 F. R. 230, § 5.
Wood v. Caldwell, 54 Ind. 281.
Edger v. County, 70 Id. 338.

The House Journal shows Mr. Dingley of Maine in charge of this bill (H. R. 9548) and that April 30, 1890, he moved its consideration in Com. of the Whole (pp. 542-4). Mr. Burrows of Mich. being chairman *(Id.)*.

In that Committee, Mr. Breckinridge of Ky. *moved to*

amend by adding to line 7 the provision that all woolen and worsted cloths pay, after Oct. 1, 1890, 35 % duty.

Thereupon

MR. DINGLEY. "I make the point of order against the amendment that *it relates to a subject different from that with which the bill deals*, and is THEREFORE not in order."

MR. BRECKINRIDGE. "I think that, as to the point of order, there can be no possible doubt. The subject is *imposts on worsted goods*—

MR. DINGLEY (interrupting.) "The subject is the *classification* of worsteds. . . . That is the subject and *no other*."

The chair (MR. Burrows) sustained the point of order, and ruled the amendment out. (Cong. Rec. Apr. 29, 1890, pp. 4142 and 4143.)

MR. CUMMINGS offered a substitute, which was the original bill with this addition;—

"but no duty shall hereafter be imposed on woolen or worsted goods in excess of 60 % *ad valorem*.

SEC. 2. This act shall take effect and be in force from and after July 1, 1890."

MR. DINGLEY. "I make the point of order that that is not germane, *being on a different subject*."

MR. CUMMINGS. "I will take the ruling of the chair.

THE CHAIRMAN. "The chair sustains the point of order." (*Ib.* p. 4144.)

The committee then rose and reported the bill to the house.

MR. CUMMINGS then moved in session of the House, that the bill be recommitted to the Committee on Ways and Means with instructions, "so to amend the same as to provide that no duties shall, after the first day of July, 1890, be imposed on worsted or woolen goods in excess of 60% *ad valorem*."

MR. DINGLEY. "I make the point of order that *this amendment is on a subject different from the bill under consideration*."

THE SPEAKER. (MR. Reed.) "The chair *sustains* the point of order." (*Ibid.*; and House Journal, p. 545.)

The yeas and nays were then desired and ordered upon the passage of the bill (*Ib.*); and, when it came up the next morning, those proceedings were had which are recited in the record (p. 19) and ante, p. 8.

Thus we learn from the member of the Committee of Ways and Means (Ho. Jo. 88) in charge of this bill (MR. DINGLEY); the chairman of the Committee of the Whole (MR. BURROWS); the Speaker (*Mr. Reed*); and, above all, the majority, in committee and House, which sustained the rulings, that the subject of the duty upon worsteds was not germane to this bill, and that the attempt to read a duty into it now is a violation of the *recorded* understanding with which it was enacted.

Farley, 40 F. R. 69 bottom.

REDFIELD, J. "It seems to us that, aside from the *private history* of this statute, no one would have given to it any more extended operation than the one here given it. If the legislature desire to pass a law making persons liable as trustees in cases like the present, it is a very easy matter to do so. But if they are too delicate, or too timid, to do it *in so many words*, or, for any other reason, do not choose to do it, we do not choose to do it for them. We choose to have a *law* upon this subject, and then we will enforce it, *if we can*. But it is enough *for us* to enforce such laws as are made to our hands, without usurping the proper functions of the legislature."

Barker v. Esty, 19 Vt. 140–1.
Steere v. Brownell, 120 Ills. 31.
Maxwell v. St. 89 *Ala.* 161.

II. Our tariff-legislation forms a *system* (17 How. 93; 116 U. S. 21) with which this act is not at all in harmony;—so is not to be supposed, from its adaptation, to be part of it; but the contrary.

To construe this law as if it imposed upon the Secretary of the Treasury the burden of classifying worsteds *for duty* is to interject a discord into the harmony of the revenue system; while classification by him is

quite consistent with the discharge of his duties as to statistical statements, under R. S. secs. 265, 3812 (or *sec. 336, item "First"*), or other similar provisions of law.

Small v. Small, 129 Pa. 374–5.

Such a statute as that for which the government contend would be anomalous, both as to the *article* to be classified and the *officer* who is to make the classification.

For five hundred and fifty years, ever since the third Edward's Flemish spinners and weavers established themselves in Norfolk Co., the name of the place [Worsted] where they carried on their industry has, in English speech and commerce, also distinguished the particular textile there first made; and thereby discriminated it from manufactures of wool.

Our earliest, tentative, tariff made little or no enumeration of textile fabrics: but in 1816 worsted, as thus distinguished from wool, and its manufactures as differentiated from those of wool, appears in our tariff (3 Stats. 310); and that commercial distinction thus long recognized in trade and manufacture, has been perpetuated in such legislation from that day to this. Construing this recognition, this Court long ago declared that a *worsted* article was one of which *wool was no component*.

Elliott v. Swartout, 10 Pet. 153.
Seeberger v. Cahn, 137 U. S. 95, and many other cases.

The centenary history of our tariff legislation affords no instance of an original classification authorized or directed to be made by the Secretary of the Treasury. The claim now set up is of a solitary exception to this otherwise universally established rule.

The classification has always been made by the col-

lector, based upon an examination had of the imports and reported to him.

R. S. Tit. XXXIV, ch. Six,
especially §§ 2901–2; 2906; 2922; 2929.

The *collector's* decision as to rate final, etc. *Id.* § 2931.

"§ 603 While the appraisement of imported merchandise determines the *value* as the basis for the liquidation of ad valorem duties, or duties dependent on value, it is *the collector of customs* who decides the *classification* of the article, and the *rate* of duties, according to the provisions of the tariff act."

Elmes, Law of Customs, 257.

Up to and after the date of this bill, protests had always been directed to, and suits to recover excess brought against the Collector. R. S., § 2931.

See the cases in this Court referred to by HUNT, J. in

Schmeider v. Barney, 13 Blatch. 42 bot.

Our claim, that this bill could not have been intended to affect the duty upon worsteds,—fortified as it is by the public declaration of its sponsor and the Speaker's ruling—is further sustained by the consideration that, so construed, it violates those principles of tariff construction which this Court has repeatedly declared to be fundamental; i. e. that primarily the commercial, and secondarily the common, designation is to determine the application of tariff laws.

Robertson v. Solomon, 130 U. S. 415, mid.,
and cases there cited.

The speech of common life, the nomenclature of trade, and the phraseology of our tariffs for seventy-five years, concur in distinguishing between woolen and worsted yarns and goods, as different, ordinary, commercial and dutiable articles.

III. There is no *express* repeal of so much of the Act of March 3, 1883, as affixes to worsted the duty for which we contend.

Repeals by implication are not favored.

Chew v. U. S., 112 U. S. 549 mid.
and authorities passim.

Especially for the purpose of adding to the burdens of taxation.

IV. It is a further presentation of the latter idea to add that, even had the Secretary actually "classified" our importations as woolens, no then-existing statute would, as a consequence of such classification, have affected them with the woolen duty.

The collector's classification *for duty* is not the mere ascertainment of the component materials, or commercial or other characteristics and uses, of an importation; but it must expressly decide the "*rate* and amount" of duties with which it is affected. (R. S. § 2931.)

The rate he thus decides upon, to be valid as against proper protest and appeal, must be that which the law expressly affixes to the article, by enumeration or as non-enumerated.

No instance can be found of a duty attaching to an enumerated article other than that which is specifically declared to pertain thereto, in the enumerating statute or some avowed amendment thereof.

V. The practical outrageous injustice of the construction for which the government contends ought to be a sufficient reason for declaring it never to have been within the contemplation of Congress.

Small v. Small, 129 Pa. 374–5.

In a time of profound peace and no public exigency,

only in the solitary instance of the tariff of 1842, from 1790 to 1890, has Congress passed a tariff act *increasing* duty to take effect upon approval; and of that tariff, the compromise-act was ten years' notice. In no case, has such action been had, except when required by war expenses, without notice.

The rapid progress of this legislation is shown by the record of Congressional proceedings thereon.

About two-thirds down the second column of page 505 of the printed House Journal, date of April 21, 1890, will be found this entry, heading the list of bills that day entered for reference and referred under clause 3 of Rule XX (that is, as to bills handed the Speaker indorsed with the name of the member introducing them. (*Id.* 230);

"By Mr. Dingley. A bill (H. R. 9548) providing for the classification of worsted cloths as woolens—to the Committee on Ways and Means."—H. J. 505.

The House adjourned from Saturday, April 21st to Tuesday, the 24th—(*Id.* 541.)

Diligent search of the Journal fails to discover any report of bill No. 9548 from the *Committee;* the next mention of it being, upon the session of April 29, when

"Mr. Dingley moved that the House resolve itself into the committee of the whole House on the State of the Union for the consideration of the bill of the House (H. R. 9548) providing for the classification of worsted goods as woolens." (*Id.* 542 bottom.)

This was agreed to, upon a call of the yeas and nays.

After a short time of interrupted debate, the committee of the whole rose, for the purpose of limiting debate, and in the House Mr. Dingley

"moved that general debate in the committee on the said bill be limited to *forty minutes*, and on the said motion demanded the previous question"—which was ordered (*Id.* 543, second column, top)

When the Committee rose that day not even clause 3 of Rule XV could help to make out a quorum, after "Mr. Dingley demanded the previous question" (which was ordered) upon the passage of the bill, only 78 voting thereon (*Id.* 545) so the House adjourned.

The next day those proceedings were had thereon which are indicated in the record (p. 19) and the first division of this brief, page 8.

April 30, 1890, it was transmitted to the Senate and referred to its Finance Com. (Sen. Jour. 270) and reported back May 2, without amendmendment. (*Id.* 274).

No action of the Senate was had upon it until it was called up on May 8 and, after very brief remarks, passed. (*Id.* 289)

The President promptly signed it, the following day. (*Id.* 305.)

To construe this bill as increasing duties upon worsteds, works flagrant injustice; since no time is allowed those merchants who had sold such goods "to arrive," or to be manufactured to order and delivered under special contracts, to bring in such goods under the rate in contemplation of which such contracts were made. There was no reason to imagine these articles would be affected by any *special* legislation, particularly in view of the general tariff bill then pending in Congress.

A construction of this character will not be forced upon the language employed.

The road of justice "curves around the corn-field and the hill of vines, honoring the sacred bounds of property."

"But as Congress wishes to foster an honest and honorable commerce by its laws, no less than obtain revenue, it is neither the true policy nor right of departments or of Courts, nor is it presumed to be their desire, to thwart the views of Congress, or embarrass mercantile business, when not attended by equivoca-

tion and fraud, or to throw doubts and difficulties over the liberal course proper to be pursued generally towards the community in any branch of trade."

Marriott v. Brune, 9 How. 635.

Research cannot discover, nor ingenuity invent, any reason grounded upon *national* exigency to require or justify the arbitrary selection of "worsted *cloths*" (not even all manufactures of worsted) for an unwarned and ruinous advance of duty.

That Congress has the *power* so to select and legislate, we do not question; but the injustice of that course should be a strong dissuasive from assuming it constructively. It is a discrimination without reasonable and just foundation.

LEVI WOODBURY, soon after taking his seat upon the bench of his native State, declared that

"An act which operates on the rights or property of only a few individuals, without their consent, is a violation of the equality of privileges guaranteed to every subject. It is also an interference with existing interests, and prescribes *a new rule for the regulation of them after they have become vested*."

Merrill v. Sherburne, 1 N. H. 212.

Whatever may have been the purpose of mere "classification" to which the terms of this act, the point of order raised by its author, and the sustentation of it by the Speaker, confine it, its hasty preparation and forced passage leave undeclared. In its ambiguity, or failure to indicate any object—except that, negatively, the Journals show it was *not* with reference or "germane" to duties—it is another illustration of the familiar maxim "Hasty legislation is bad legislation."

From its Congressional history, as shown by the Journal of the House, we have shown what it is *not*. Beyond that, it is not worth while for counsel to argue, or the Court to conjecture, what it *is*; though we have shown that it *may* be applied to the statistical duties

of the Secretary. Otherwise it is unintelligible, so wholly ineffective. We are not bound to show its true application, so long as it is shown not to affect us.

"I do not regard the argument as of any serious moment which would, by their force, confer a meaning by construction upon the unmeaning or unintelligible words of a statute. If upon the literal and legal reading of the words employed they are incapable of application or enforcement, the act simply falls. It is incapable of execution, and of this there are many examples in the books. A notable instance of this kind occurred in the case (Com. v. Bk. 3 W. & S. 173) in which this Court refused to enforce an act, for the express reason that the meaning of the act was so uncertain that it could not be determined to the satisfaction of the court.

It has been repeatedly held, if the plain words of a statute lead to an absurd result, that is not any reason for changing the natural interpretation of the word employed."

Pa. v. Pittsb. 104 Pa. 547, citing
Com. v. Bk. 3 W. & S. 173.
Abley v. Dale, 11 C. B. 378.
Woodward v. Watts, 2 El. & Bl. 452.
Frye v. Chicago, 73 Ills. 399.

DENMAN, C. J.

"If we find language used which is incapable of a meaning, we cannot supply one. . . . Those who used the words thought they had effected the purpose intended; but we, looking at the words as judges are no more justified in introducing that meaning than if we added any other provision."

Green v. Wood, 7 Q. B. 178. 185.
McConnville v. Jy. Cy. 39 N. J. L. 38.
Ward v. Ward, 37 Tex. 89.

Instances of such hasty, unintelligible, legislation are numerous; as "An act to manage and pave the town of Brighton and the poor thereof" (Potter's Dwar. 118 note E); the Va. law "to punish the alteration of

brands upon unbranded hogs," and many other similar enactments.

The U. S. Rev. Sts. Sec. 1628 requires every enrolled citizen to provide himself "with a good musket or firelock" of an indicated bore, other corresponding equipments, and "two spare flints."

The second part of Lord Coke's report is prefaced by an "Address to the Reader," commenting upon acts of Parliament:

"many times *on a sudden penned* and corrected by men of none, or very little, judgment *in the law*;" adding further;—"If acts of Parliament were after the old fashion penned by such as perfectly knew what the law was before the making of any act concerning that matter," etc., "therefore should very few questions in law arise, and the learned should not so often and so much perplex their heads to make atonement and peace by construction of law between insensible and disagreeing words, sentences and provisoes," etc.

Even those eminently learned sometimes fail to express any intelligible meaning. Sir Saml. Romilly autobiographically describes an interview with Lord Eldon:

"He one day sent for me and showed me two clauses which he had drawn, and which he proposed to add to the bill, and asked me what I thought of them. They were so obscure that, after reading them repeatedly, I found myself, very reluctantly and with great shame, obliged to ask him the object of them."

2 Romilly's Life, 72.

Of an act of Parliament, MAULE, J. observed that it was "incongruous and impossible of operation, and its absurdities so great that the framers themselves had no very distinct notion of its meaning."

Stratton v. Pettit, 16 C. B. 432.

If the phraseology of this act does not *clearly* indicate its applicability to any subject of legislation; if it

does not expressly and inevitably impose a new duty upon worsted cloths (in a certain contingency), then the old duty attached to such importations by the Act of 1883 is the only one assessable thereon.

"The law must remain as in was, unless that which professes [which, we say, this Act does not] to change it be itself intelligible."

Drake v. Drake, 4 Dev. 110.
St. v. Partlow, 91 No. C. 552–3.

III.

Secretary did not classify our imports.

If, contrary to every one of the above-mentioned rules of construction, this statute could, by interpolation of words additional to those employed by Congress, be held to direct a dutiable classification by the Secretary of the Treasury, the effect of which would, *proprio vigore*, supersede the tax expressly and in terms imposed by law upon the mentioned article, still our importations would not be subject to the increased rate.

Of all the countless articles of every description (and of the multitudinous ones of which worsted is a component) brought into this country, only "worsted *cloth*" is selected for classification by the Secretary of the Treasury. (26 Stats. 105; *ante*, p. 2.)

We claim that our goods were dutiable as "manufactures of worsted," and not as "woolen cloths." (Rec. pp. 2; 5 top; 11 finding (1); 18 bottom; 20, fol. 46.)

"The merchandise was returned by the *appraiser* upon the invoices as '*woolen* cloths under eighty cents,' etc." (Rec. 5 top.)

The uncontradicted testimony proved them not to contain a stitch of wool;—"composed of worsted yarn solely; entirely of worsted." (*Id.* p. 18 fol. 42 and 20 fol. 46.); and so known in commerce. (*Ibid.*)

There is no syllable of any statute permitting an *appraiser* to return an article, in any single instance, as a different thing from what it is in fact.

Even chapter 200 of the statutes of 1890 (ante p. 2) does not attempt to destroy or confound the physical and commercial identity of 'woolen cloths' and 'worsted cloths;' but, recognizing the distinction it requires these *two* articles to be, for some purpose, put into the same *class*, by the Secretary of the Treasury. If this be on account of some likeness of origin or use, yet similarity is not identity. Nullum simile est idem.

"(1) CLASS. A group of *individuals* ranked together as possessing common characteristics." Webst. Dict.

The bearing of these observations, *if* the classification be for dutiable purposes, and the *appraiser* undertake to classify, will now be shown, by a statement of the modus procedendi.

The collector designates imported packages for examination. (R. S. Secs. 2901 and 2939.)

The New York appraiser directs and supervises this examination, and reports the *valuation* to the collector. (*Id.* Sec. 2614.)

The assistant appraiser is to make the examination. (*Id.* Sec. 2615.)

Generally, in other ports, he does this personally; but, as to New York, special provision allows him the assistance of examiners. (*Id.* Sec. 2536, item "second," and Sec. 2538.)

Elmes, customs, § 486.

The Treasury General Regulations of 1884, Art. 1400, impresses upon these customs-officers the idea that

"As the examinations of appraisers are made the

basis of the general classification of importations for the imposition and assessment of duty, it becomes necessary that appraisers shall closely inspect the articles ordered for appraisement," etc.

Elmes, §§ 570, 585.

The language of this Court touches the evil of which we complain, in having our 'manufactures of *worsted*' returned as '*woolen* cloths':

"It would be unreasonable to overturn the invoices and oaths of importers, unless by a personal inspection and examination; an insufficient value should clearly appear to have been affixed, considering *the quality of the article* first, and next the market value abroad of articles of *that quality*, at the time required by law."

Greeley v. Thompson, 10 How. 239.
Same v. Burgess, 17 *Id.* 415–6.
Morlet v. Lawrence, 3 Blatc. 123.

If they wrongly assume an importation to be silk instead of cotton, or woolen instead of worsted, of course they will seek to ascertain the foreign market value of that article which it is *not*, instead of what it is; and will erroneously look to the principal market for silk or woolen, instead of that for cotton or worsted, goods.

A yard, or a pound, of an article made of wool may be worth as much more than a similar one of worsted, as silk may exceed cotton material in value.

The principal market for woolen cloths may be Leeds; that for worsted manufactures may be Bradford. Thus the value of the wrong article, in the wrong market, may be made the basis of duty.

Robertson v. Frank, 132 U. S. 17.

The question of identity—whether the importer or customs' officer correctly named and defined the importation, as a dutiable article—was, prior to the administrative act of June 10, 1890, determinable by a jury; now by the court.

Tyng v. Grinnell, 92 U. S. 467.
Recknagel v. Murphy, 102 *Id.* 197.

The issue always is, in tariff cases, by which of two names an article is enumerated or denominated.

The true denomination is always important; in the case of worsted cloth as in any other case. This act of May 9, 1890, does not say that woolen and worsted cloths shall be deemed one, but that the *Secretary* shall classify the one (worsted cloths) with, or like, the other.

Our importations the *collector* classified as "woolen cloths"; we show, indisputably, that they are *not*, but are manufactures of worsted.

That the *collector* classified them is evidence (if this statute refers to dutiable classification) that he found them to be "woolen cloths"; for had he found them to be *worsted* and *cloth*, he would have had no power to classify.

IV.

Effect of Secretary's Failure to Classify.

We are now brought to consider the conceded fact that the Secretary did *not* classify these importations.

If the statute can, upon its face, and in direct contradiction of the journalistic record of the action of the House thereon, be held to intend classification for duty, and to impose, unwarned, an increased and severe tax *by implication*; and if it was legally enacted;—even then, it only makes this imposition *sub modo*.

No part of the general tariff of March 3, 1883, is repealed; not even as to any article included in its enumeration (125 U. S. 77 top) of "manufactures of worsted." If this act of May 9, 1890, at all affects that of March 3, 1883, it is only to the extent that *one* of these enumerated manufactures shall be classified by

the Secretary of the Treasury with another article *denominated* in the tariff of 1883. If *thereby* affected with a higher duty, it is *only* thereby. If this condition precedent be not performed, the dependent right and liability does not accrue. If left to be classified by the collector, as other importations are, *he* can only classify under the general laws, and the tariff of 1883.

This applies to the action of the Secretary the same rule frequently applied to that of customs officers.

The value assigned to his goods by an importer may be raised by the appraising officers, only *provided* they act in accordance with law in doing it. If they do not *examine* the goods, the value declared upon the entry stands; if the examination be made by one not possessing the necessary qualifications, the entered value stands.

Converse v. Burgess, 18 How. 413.
Oelberman v. Merritt, 123 U. S. 356.

If the Secretary does not examine or classify, the old rate of duty alone attaches.

If this act of May 9, 1890, relates to import-duties, the word "classify" therein must mean precisely what it always has in tariff administration. We have shown it there to imply examination, determination, judgment.

If it *can* be considered that the terms of this act do not bind the Secretary to *personal* examination and classification, it certainly does require *his* intervention, in some form; *his* action, in some method;—and he did absolutely nothing—personally, nor by supervision, direction or substitution, with reference to our goods.

Upon the face of the record, we may presume the matter was not called to his attention because the customs-officers found them to be "*woolen* cloths"—so not within this act nor the Secretary's jurisdiction, but left to the collector;—or, else, it was a contemporaneous departmental construction that this act did not pertain to the subject of duties.

This statute singles out the one article of "worsted cloth" for classification by the Secretary; hence, it cannot be assumed that the ordinary course was to be pursued with reference to an exceptional article, and to peculiar language, expressly directing extraordinary procedure.

Upon this point we will append and refer to the opinion of the learned judge below, not printed with the transcript. (See App., p. post.)

The Secretary's general supervision over the collection of duties does not enable him to make any *original* classification; since this function is assigned to other officers; and, always before this date (May 9, 1890) and for nearly three months later—until the administrative act took effect August 1, 1890—as to every article (except worsted cloth, during these three months) an *appeal* lay to the Secretary from the action of the subordinate officers. As to this one commodity, if any appeal was left after May 9, until Aug. 1, 1890, it was only that which the Macedonian woman took from Philip.

Upon the ordinary appeal to him, the Secretary did always act, with reference to the classification of and duty upon, the very importations, involved in the appeal.

The Solicitor-General may treat it as absurd to suppose this act required the action of the Secretary upon every separate importation claimed to be worsted cloth.

In addition to the preceding suggestion, that his judgment could be invoked by appeal as to every other imported article, we shall reply that—as applied to, or a part of the customs-revenue system of the country, the act itself is undeniably absurd. The more such application of it is attempted, the greater its absurdity appears.

The absurdity assigned by the government to our contention consists entirely in our claim that the Secre-

tary shall do that which the law explicitly declares shall be done by the Secretary ; so the supposed absurdity shifts from us either to the application made of the law by the Government, or to the law itself.

As to the *legal subject* and the *legal action* to be performed (as defined in the following extracts from Mr. Coode's monograph—italicized as in the original) this five-line statute is peremptory, even if it omit to assign any *effect* to the act required to be done by the designated official.

"The person who may or may not, or shall or shall not, do something is the *legal subject* of the legal action.

The importance of a just discrimination and correct expression of the legal subject cannot be exaggerated. The description of the *legal subject* determines the *extent* of the law. On this portion of every legal sentence it depends whether a right or privilege shall be limited to too few persons, or extended to too many ; whether an obligation is imposed on more persons than is necessary, or *is not extended to sufficient persons to secure the correlative right ; whether powers are reposed in right or wrong persons ;* whether sanctions are or are not made to fall on the proper subjects. . . . It is here that exemptions are filched by undetected omissions of persons, and encroachments effected by incautious insertions.

Coode on Leg. Expr. *9.

This statute expressly designates the Secretary as the person to make the prescribed classification of worsted cloth ;—and the cases quoted and cited in the second division of this brief (*ante*, pp. 25–29) are an answer to any request upon the part of the government to have this designation or duty changed by judicial construction, or by any addition to or modification of the legislative language.

"And the judges said they ought not to make any construction against the express letter of the statute ; for nothing can so express the meaning of the makers

of the act as their own direct words; for *index animi sermo.*" Edrich, 5 Coke Rep. 241.

Coxhead v. Mullis, 3 C. P. D. 442.

A recent opinion of the Illinois court meets the eye, since the second division (*ante*, pp. 25-29) of this brief was written, and this language quoted therefrom can be equally as well inserted here.

"It is not permissible for the court to insert words, in a statute, not used by the legislature. The meaning and intent of the legislature are to be ascertained from the words employed; and we are not permitted to qualify the words of the act by arbitrarily introducing words which would limit" them.

Steere v. Brownell, 110 Ills. 31 mid.

quoting

Everett v. Mills, 4 Sc. (N. C.) 531.

"The statute requires the indenture shall be approved of by the justices under their *seals*. I cannot tell *why* the legislature required that the indentures should be approved of under their seals; but they *have* so required, in express terms, and I cannot say that they did not mean that which they have so expressed."

King v. Stoke, 7 B. & C. 570.

Bradbury v. Wagenhorst, 54 Pa. 182.

"If we find language incapable of a meaning, we cannot supply one. It is true we have words here which, as they stand, are useless; a circumstance, perhaps, not altogether unprecedented. But to give an effectual meaning, we must alter not only 'or' into 'and,' but 'issued' into 'levied.' It is extremely probably that this would express what the legislature meant. But we cannot supply it." [then, as hereinbefore quoted, *ante*, p. 39]

Green v. Wood, 7 Q. B. 185-6.

A late Alabama opinion speaks thus:

"However clear we may be as to the actual intent of the legislature, *dissociated* from the language employed, the fact remains that that language evinces an entirely

different intent, and however well assured we may be that its use was inadvertent, we must be guided by it. *Index animi sermo.*"

Maxwell v. St. 89 Ala. 161.

The English courts have not hesitated to declare acts ineffective, while avowing a probable conjecture as to the legislative intent.

Ld. Campbell, C. J. "I really cannot doubt what the legislature intended to do; but they have not carried it into effect."

Coe v. Laurance, 1 El. & B. 518.
Smith v. State, 66 Md. 217.

Ld. Denman, C. J. "There is evidently a mistake in the act; but we have no power to correct mistakes or omissions of the Legislature."

R. v. Mabe, 3 A. & E. 534.
Nixon v. Phillips, 7 Ex. 192-3.
Woodbury v. Berry, 18 Oh. St. 462.
Bosley v. Mattingly, 14 B. M. 89.

Westbury, L. C.

"The Vice Chancellor is of opinion that what he denominates' the abstract justice of the case' requires this interpretation. I cannot concur in that reasoning. . . . I cannot admit the principle that, in a matter of positive law, abstract justice requires any departure from the established rules of interpretation."

St. Sepulchre, 33 L. J. Ch. 375.

The instantaneous application of this act (if it affects duties) to goods afloat or in bonded warehouse (as we have noticed) shows the injustice to be entirely on the side of the construction contended for by the Solicitor-General.

If done at all, it should be only in those cases in which the Secretary determined the goods to be *cloth*, made of worsted.

"The *legal action* is that part of every legislative sentence in which the right, privilege, or power, or the

obligation or liability, is defined;—wherein it is said that a person *may* or *may not*, or shall or shall not, do any act.

As the *legal subject* defines the extent of the law, so the description of the *legal action* expresses the *nature* of the law. *It expresses all that the law effects, as law.* . . . It is in the terms in which this *legal action* is expressed that every right, privllege, power, obligation, and sanction, is contained. . . . It is in these few words that the efficacy or inefficacy, the cause of failure or success of the law is to be found. . . . The *legal action* should immediately appear on inspection of the sentence. No good enactment requires to be covered up in deceptive language,' etc., etc.

Coode on Leg. Expr. *10.

It was a *personal* authority, delegated to the Secretary, to do an unusual act. No existing law applied the ordinary machinery of appraisement and classification to any such case. Therefore, as the Secretary has not acted, nothing has been done to authorize the exaction of which we complain.

This brief is prepared before receiving that of the appellant. We have acted upon our own assumption of the ground upon which it must rest the claim for that construction for which the district-attorney contended. Should occasion require, we will further comment upon the Attorney-General's argument, when received.

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APPENDIX.

Judge Lacombe's Opinion.

IN RE BALLIN ET AL.

JANUARY 27, 1891.

LACOMBE, J.: There is nothing on the face of this act indicating that it is intended to repeal or in any way alter any act imposing customs duties. It is contended that in the existing state of affairs when this act was passed, in the former statutes, in the decisions of the Courts, and in the debates of Congress, we may find sufficient to warrant the conclusion that it was the intention of Congress by the passage of this act to deal with the question of the duty to be laid upon goods such as are imported here, and to change their *status* so as to lay upon them a higher rate. Conceding that, for the purpose of this argument only (and it is only for the purposes of the argument that I am prepared to concede that proposition), let us see with what machinery they undertake to carry out that intent. There already existed an elaborate and well-considered scheme for appraising and classifying imported articles, by means of appraisers and their subordinates, who made examinations and reports touching the component materials and values of goods; and by means of local officers (the Collectors) in the respective ports where the goods came, who made their own classifications relating to them. There had been elaborated a sufficient scheme, which had been in force for many years, with the intention of securing by the machinery thus employed a faithful, just, impartial and truthful ascertainment of the real facts of each case, and of classifying the goods according to such facts as were thus ascertained. This act, however, proceeds upon an entirely novel theory. It provides expressly for a classification in direct non-conformity to the facts. It authorizes an officer of the Government who may find an import to be in fact an article which under the tariff laws pays one rate of duty, to *call* it something else, which it is not, in order to enable revenue officers to levy upon it

a rate of duty which that other article, which it is not, pays. Now, this is a very extraordinary species of legislation; and there is no reason why we should be surprised to find that Congress has confided the exercise of those peculiar functions to a very high officer of the government. When Congress has expressly confined that exercise, as it has by the language of this act, to the Secretary of the Treasury, I do not think that the courts are warranted in finding that power in any other officer. I do not mean by that to suggest for one moment that under the phraseology of this act it is the duty of the Secretary of the Treasury to himself examine the packages of goods, to handle or see their contents; but, having been informed and advised as to the facts in the same way in which he is is informed and advised upon any facts upon which he is required to pass, by the examination and report of such trustworthy subordinates as he may select, the final classification of the particular articles is one to be made by him. The return here distinctly finds as a fact that he reached no such conclusion, nor undertook to do so in the case of the importations here involved. For that reason I think that this action cannot be sustained. The decision of the Board of General Appraisers therefore in this case is reversed. A proposed order of judgment may be prepared, as in the other case, and submitted for settlement.

C. G. Burgoyne's Printing Business, 146-150 Centre St., N. Y.

Supreme Court U. S.
FILED.
NOV 30 1891

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 1061. U. S. *v.* BALLIN *et als.*

APPELLEE'S REPLY BRIEF.

The government brief having come to hand, we desire to file a short note of reply thereto.

I.

Yea and Nay Quorum.

No great illumination is thrown upon the subject by recourse to the debates, in regard to a Quorum, in the Constitutional Convention. It was well known that three Lords made a Quorum in the English Upper House; so that a bill, barely passed by the majority of a quorum in the Commons may go through the Lords by the vote of the Duke of Marlboro' and the Marquis of Steyne against that of the Duke of Argyle; and then could become a law or a nullity according to the will of one man (or whim of a woman).

There was nothing from which our forefathers more

decidedly determined to depart than from the English scheme of enacting laws.

The evil about which the discussion arose, which the Atty. Gen. reproduces, was *absenteeism*. Members remained at home, not going to Philadelphia; and thus the vote of a *State* might be lost.

Actions speak louder than words. That the quoted debate had no such aim, and the adopted clause no such scope, as to sanction the rule we are considering, is evidenced by this: that when the rules of congressional procedure were framed, by those *quorum multi* had been members of the several constitutional conventions, no such rule was adopted; nor has it ever been by the Senate, whose quorum is more easily destroyed. It is not to the Speakers' decisions of the last hundred years alone that we appeal, but to the rules under which these were made, as indicating the contemporaneous and subsequent construction put upon this clause of the constitution. To meet the apprehended evil, just as extensive a rule was adopted as it was then supposed this clause would sanction.

Nor do the common-law or other decisions as to the validity of elections, or of the proceedings of theological assemblies, or corporation directors, or town councils, greatly enlighten us. A board of aldermen or directors ordinarily consists of less than a dozen persons, sitting at the same table with the clerk, who is familiar with every face, and customarily makes an enumeration of their names, as present, the very first entry in his minutes of the meeting. If he specify the five (out of seven or nine) directors who attend, there is a fair presumption of their presence continuing; and when (as in 62 N. H., 383) an alderman demands the yeas and nays, it is the duty of the clerk to record that demand, and the person making it may fairly be assumed to be present, watching a proceeding taken at his instance.

There is no analogy between these instances of eight or ten gentlemen, sitting around a library table, and that of nearly four hundred representatives, constitutionally assembled at the Capitol, engaged in enacting laws for a Nation; and nothing is so sure to mislead as a false analogy.

The composition of the House changes radically every two years; and, not infrequently, this leads to a change of Clerk: no roll-call, or enumeration, precedes the entry upon business; can it be supposed a new Clerk of a new House, at the commencement of the session, *can* preserve in his mind the identity of every member? Yet the right to enforce this rule then exists, if at all. Will he not, especially if willing to be deceived, be in danger of mistaking an eminently-respectable messenger for the honorable representative from Sitka?

The very first proposition of the Solicitor-General (although untenable) may be used to emphasize this want of analogy. He contends an approved act cannot be impeached, unless by the Journal; in which case, the latter is unassailable; so that the Sitka representative could not be allowed to prove the mistake, if made. The clerk's declaration enacts the law. Now, if the Clerk of the B. & O. R. R. should enter Mr. Garrett as present at a directors' meeting, neither Mr. G. nor anybody else would be precluded from proving his absence, notwithstanding the entry.

Their own ability and diligence, and the assistance always available to the Speaker and the Department of Justice, in the search after authorities and precedents, make it morally certain that those cited upon appellant's brief are all, or fairly represent all, that can be produced in support of the right to count a Quorum from the non-voters upon the question of the passage of a law, *as to which the yeas and nays have been ordered* and are taken.

Having carefully examined these citations, we confidently assert that *no one of them touches the issue in the present cause.*

Every one of them merely defines the *common-law* meaning of "Quorum" as applied to the affairs of a corporation, municipal or other. There is no need to resort to them to learn the nature of a congressional quorum; the Constitution authoritatively defines it. Another clause of the same section is, so far as the point at issue in this case is concerned, the correlative and (to a certain extent) qualification of the former. Upon this clause we lay stress, but *it is entirely ignored* by our opponents! In their voluminous brief, *not one word is said as the nature and extent of the right to the yeas and nays secured by this latter clause.*

A majority constitute a quorum to do business; with this accompanying condition, that when the business is the decision of a question, one-fifth may require *this* business to be done by yeas and nays, *on the question*, entered upon the journal. *If the yeas and nays so entered do not do the business upon the pending question it remains undone.* In 127 U. S., 579, and other opinions cited, a "*general*" rule as to the action of the majority of a quorum (in the *absence* of special provision) is stated; implying the recognition of exceptions and conditions, of which this is an example. This constitutional question is not settled by showing a decision that a majority of a quorum of the city council of York can locate a bridge across Codorus Creek!

When the Constitution, under certain circumstances, requires the business (which only a quorum can do) to be done in a specified way, the method of doing it is as essential as the presence of the quorum.

When one section of the Constitution expressly and another by irresistible inference declares that certain questions and business shall be "DETERMINED" *by yeas and nays, that business and that question cannot be determined in any other manner; nor by supplementing the*

method prescribed by the Constitution by any other procedure, without which the constitutional means of determination would leave the business unfinished, and the question unanswered.

Such is our proposition, from which the able and extended brief of the appellant entirely steers aside.

That the yeas and nays do not '*determine*' the question, where such supplementary proceeding is resorted to, seems obvious; but it can be made even more so by an illustration. Suppose the Clerk to note Felix Grundy as present and not voting, while the yeas and nays are being called upon the passage of a bill, and that his presence was necessary to make up a quorum; suppose him to immediately deny (so soon as this 'record' came to his knowledge) that he was present, and to assert that he was in Tenn.; then, upon an issue like the present, the question of the passage of the bill into a law would be *determined* according to the fact of his presence or absence, and not by the yeas and nays.

If a man is entered as voting 'yea,' when he actually answered 'nay,' he can correct the error upon recapitulation; but if an absentee is recorded as present, and thereby a bill is declared to have passed, he will not be there to correct the error.

If it can be imagined possible that this Court should overrule Gardner vs. Collr. 6 Wall. 499, and sustain the Attorney-General's claim that the document in the State Dept., or the Journal, is conclusive of the passage of a bill, then the honest or fraudulent misentry by the Clerk of the presence of one or more members, who were actually absent, might enact into law a bill upon which no quorum voted or was present.

Appellant makes the passage of a vetoed bill depend upon two-thirds yeas of a *quorum*—not of the *votes*.

The query whether a Quorum is not as necessary to hear the Journal read as to pass a bill is not relevant enough to require answer: The real issue is as to the effect of the call of yeas and nays "on any question;" and reading the Journal is not a 'question.'

If some of the authorities cited by appellant are accepted as applying to this constitutional provision, they do sustain the Speaker's theory, that those not voting might be entered as saying 'yes' or 'no' accordingly as the majority of the responses were affirmative or negative! This idea has not been acted upon yet, but it is foreshadowed. We deemed this the *reductio ad absurdum* when we made our former brief; still looking at it in the same way, we will not discuss it.

II.

Construction.

To construe this law as affecting any goods with duty has to be done by *assuming* it to be a tariff-act, without anything upon its face indicating it to be so. (Our former brief, pp. 26, 27.)

The very act of Feb. 8, 1875, "to amend customs laws" to which the Atty. Gen. refers speaks of classification "*for duty*," as distinguished from any other purpose. "The classifications of the law," (Schedule A, B, etc.) are one thing; a direction for an officer "to classify" is another. Instances of statutory requirement of a classification of imports, by the Sec'y., *not* for duty we have already mentioned; *ex gr.* R. S., Sec. 336, "First," etc. etc. *Merely* to classify an import does not imply, or enact a duty thereon. (Our Br. pp. 26–7.)

Even when employed avowedly as to tariff proceedings, "to classify" does not imply merely a *construction* of the law, but its *application* to a state of facts (with regard to the *goods specified in a particular invoice*) previously ascertained *by the very person* who is to make the application or classification; this, heretofore, having invariably been the collector.

Mere perusal of the half-dozen lines of act of May 9, 1890, c. 200, shows it to contain no direction to the Sec'y, as to how he shall construe any part of the act of 1883, or any other tariff. It does not require of him any *construction* of law (and *he never made any* under it) but *the performance of an act*. Nothing in its language attaches it to the act of 1883, any more than to R. S. § 336, or many other provisions of law; and the long-known rule against dutying by implication, dissevers it from any tariff connection.

The appellant mistakes Judge LACOMBE. Neither he nor the importers ever, for a moment, thought of denying the *power* of congress to associate articles for duty as incongruously as it pleased. In reading their brief, we at once thought, "Congress might duty tinware as wearing apparel, if it pleased"; but we will accept the Atty.-General's illustration that it might construe 'woolen cloths' to include brass buttons. True; but when they have *not* done this directly, its evident and awkward absurdity is a cogent reason for refusing to do it by implication and judicial construction; or, when it is said this absurd proceeding shall be done by the Sec'y, for refusing to consider it as done by him, when he actually did not do it. This is clearly Judge LACOMBE's meaning, and the purport of his language.

This error of law, as to what it is "to classify" an import *for duty* is supplemented by a mistake of fact, as to "the violence done to physical facts" (Govt. Br. p.) by the construction there claimed. It says:

"Worsted cloth is woolen cloth, because it is cloth made of wool. * * * The Secretary, by act of May 9, is merely instructed to thereafter give to the term 'woolen cloth' its meaning *in ordinary language*." (*Ib.*)

Not so; and into this mistake Judge LACOMBE did not fall. Construing the tariff of 1832, this Court noticed "that worsted is a *distinct* article, *well known* in commerce under that denomination;" and held that worsted shawls with cotton borders were *not* articles "of which *wool is a component*." (10 Pet. 152-3.) Neither Congress nor this Court *created* this distinction, which is not technical nor arbitrary. It existed hundreds of years before our Congress or our Court. When Congress legislated, it recognized the meaning of "ordinary language" and terms; it did not invent new ones. No lady who sent a messenger for worsted yarn would consider her order obeyed if woolen yarn was brought her. In our brief in Soeberger vs. Cahn, 138 U. S., 95, we explained the character of the distinction: almost as great as if the two articles had no common origin. It is not that worsted is merely combed wool; but that the combing process separates fibres substantially different in their structure and imbrications. In preparing a sealskin for use, the scraping of the inside separates the hair from the fur, the two being as different as if grown upon different animals. The hair upon the belly of a cow or calf is so different from that along the spine as to be practically a different material. The former can be felted, the latter not. It took protracted litigation, and several appeals to this Court, to establish that this hair was not wool. So far, then, from the act of 1883 introducing any new distinction, it merely contained that recognition which had appeared in our legislation for seventy years, and in commerce and ordinary speech for more than five hundred.

It is not simply that the act of May 9, 1890, is inconsistent with that of 1883;—it is not so necessarily, but only by the construction given it by the government. *So construed*, it antagonizes not merely the act of 1883, but *every* act of our tariff system, from 1816 to its date. This is not an argument against the power of Congress, but against the construction of the collector.

That Congress can require a construction to be given a former statute quite different from what it has heretofore received, nobody questions. What we do deny is that it has done so here. When it desires to accomplish this, it is effected by explicit language, such as is employed in the case quoted by appellant. (20 Wall., 331.)

Movius vs. Arthur, 95 U. S., 144.

The proposition which is the basis of the entire defense to our action is that Congress directed the Sec'y. to construe a term in the Act of 1883; if this be not so, our judgment must be affirmed. (Appellant's Br. p. .)

We repeat, not so. It directed some action by him with relation to imported worsted cloths. If that action *can* be inferred to relate to the subject of duty, we know that a dutiable classification is the indicating of a rate, based upon the actual examination of the very articles which come consigned to a particular person, under a produced invoice, by a named ship, upon a designated day; and that the rate *so* ascertained is endorsed upon the invoice by the person who ascertains these facts. (See former br. pp. 34, 35.)

No regulation by the Sec'y. can change the law (though this has been often attempted; 104 U. S. 694; 106 *Id.* 466, etc.) but only direct action in strict conformity therewith. Ex gr., to follow appellant's brief, (p.) an appeal was given the merchant from the

Collector's classification to the Sec'y., who then acted directly with reference to a specified importation; no "regulation" by him could direct the appeal to be heard and decided by a collector, or the commissioner of customs.

And the Secy.'s instructions and decisions are only binding etc. upon the officers of the customs" (*Ib.*).

The only action of the Sec.'y under this law was the issuing of a circular (according to Appellant's Br. p.) to collectors and other customs officers, of this tenor. "The following act of Congress approved May 9, 1890, is herewith published for the information and guidance of all concerned." Then merely follows the text of the act.

The same counsel who argues so strenuously that you can take no cognizance of any amendment to a bill in Congress, or of the methods resorted to in the alleged enactment of a law, assume as unquestionable that you will take judicial notice of an alleged circular of an Asst. Secy., not introduced upon the trial. *Quære de hoc?* but no matter.

This circular contains no instruction. The Attorney-General (Br. p.) says it promulgated, for their guidance, that law of which every citizen was bound to take notice. Well, to what does it guide? To something outside of its terms? or (if applied to dutiable classification) to notify them that such goods as appeared to be worsted, and also to be cloth, should *not* be classified by them, but should be referred to the Sec'y. for this action?

If the *law* required his subordinates to classify worsteds as woolens, no instructions from the Sec'y. to that effect were necessary.

If the law did not require *them* to do this, no mere communication of its tenor to them by the Sec'y. would make it their duty to do it.

If the law required it to be done by the Secretary (as

it clearly did) he could not transfer that responsibility to his subordinates.

Counsel misread the language of Judge LACOMBE, which they quote. The Judge expressly disclaimed the idea of a personal examination of the goods by the Secretary; but held he should be informed of and decide upon the facts precisely as he did in every other case upon which he actually passed.

In short, he was required to do *something*, and he did *nothing*.

As observed in our former brief, whatever of absurdity there is *in the application of the law to dutiable classification* (there is none in any other) is that of the law and not of the Court.

We had assumed that if this law affected that of 1883 as to the nature of the classification, it also declared it did so only when classified by a different officer from him who usually classified imports. We did not think of the absurdity of *two* classifications *of the same importation* by different officers, antagonistic to each other! *This* absurdity originates in the mind of the Atty. General. It is not surprising that the attempt to fit the language of this act into our tariff system should confound the strongest intellect. It may easily have made us misapprehend the Attorney-General's meaning.

Whether the imposition of a lower rate upon goods classified by the collector than upon those classified by the Sec'y. would be any more unconstitutional than the putting of a different duty upon the same goods, as they may chance to come from one side or the other of the Cape, we have no occasion to consider. We had supposed the uniformity required to have relation to different ports of arrival. But that does not concern us.

Our goods the collector classified as, because he supposed them to be, *woolen* (not worsted) cloths. We

proved them "manufactures of worsted" and were thereon entitled to the judgment we obtained.

To support the theory that this act was intended, *ipso facto*, to change the rate of duty upon worsted *cloths*, without changing the method of ascertaining whether an import was worsted, and was cloth, the Attorney General refers to the "history" of the subject.

We are reminded of Sir Robt. Walpole's reply to Horace's inquiry, what should be read to him? "Read me anything but history; that, I know, must be *false*."

He knew how incorrectly that part of it was told which he had helped to make.

If the pound duties were "compensatory" originally, we know (from our connection with Ballin vs. Magone, 41 Fed. Rep. 921) that they did *not* cease to be so by reason of any improvement of combing-machinery. Whether included or not in the transcript in that case (not made up by us) we know the uncontradicted testimony was that there had been *no* improvement in such machines since 1851; and that an American manufacturer, who had been often in Bradford, upon being asked to state the difference between such machines, used here and there, or then and now, said there was none—they were identical. There was a little loose talk about an experimental French machine, admitted *not* to be used upon our worsted imports into this country, nor practically to any extent anywhere; and this was the basis of the falsehood that was foisted upon Secretaries Fairchild and Windom; and which induced the latter, administratively, to repeal a law that had stood upon our statute books for nearly thirty years, with its meaning and effect unquestioned.

This Court has always declared that the opinions or utterances of members in debate were inadmissible to affect the construction of an act; but that the *proceed-*

ings in Congress might be referred to, as part of its history.

Now, the motions to amend, and the rulings of the Speaker thereon, entered upon the Journal, are part of these historical proceedings. It was not simply the chairman of the Committee, but also the Speaker, who sustained the point made by Mr. Dingley (every time) that the subject of duties upon worsted was *not* germane to the subject of this bill.

To claim then that duties were *not* its subject, and thereby to preclude any amendmentrelating thereto; and to assert now that its *sole* and instant effect was, *ipso facto*, to increase the duties upon worsted cloth, and that such was the real intent of those legislators who declared to the contrary, would judicially sanction a most outrrgeous breach of good faith.

Nevertheless, that alone would not affect our importations with duty which were assessed as "woolen cloths," and proved to be 'manufactures of worsted.'

But should this Court consider the debates, &c., as at all affecting the bill, it will be seen that Mr. Dingley stated, hypothetically, that *if* this bill affected the duties upon worsted, it would *not* be directly, but only through and as the result of a *classification* by the Secretary.

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